

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6168

To be argued by
WERNER L. POLAK

United States Court of Appeals
FOR THE SECOND CIRCUIT

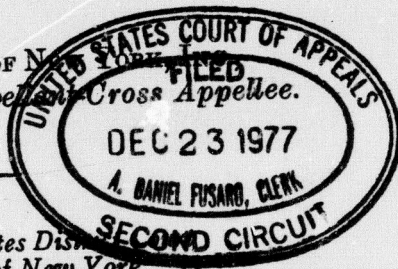
No. 77-6168

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross Appellant,

— against —

CONSOLIDATED EDISON COMPANY OF NEW YORK,
Defendant-Appellant-Cross Appellee.

*On Appeal from the United States District Court
For the Southern District of New York*



BRIEF OF DEFENDANT-APPELLANT

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STATUTES AND RULES

I. Constitution of the United States of America

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Atomic Energy Act of 1954:

Section 161(v)—42 U.S.C. § 2201(v)

[In the performance of its functions, the Atomic Energy Commission* is authorized to]

(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or

* See note, page 2 of this brief.

enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection: *Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless

the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

III. Public Service Commission Schedule of Electricity Service No. 6, Third Revised Leaf No. 18 (Dec. 23, 1968)

13. Liability

(a) Continuity of Supply: The Company will endeavor at all times to provide a regular and uninterrupted supply of service, but in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants or agents, the Company will not be liable therefor.

The Company may, without liability therefor, interrupt service to any Customer or Customers in the event of emergency threatening the integrity of its system if, in its sole judgment, such action will prevent or alleviate the emergency condition.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-6168

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross Appellant,

— against —

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant-Appellant-Cross Appellee.

*On Appeal from the United States District Court
For the Southern District of New York*

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

This brief is submitted on behalf of defendant-appellant Consolidated Edison Company of New York, Inc. ("Con Edison") on its appeal from a judgment of the Honorable Lawrence W. Pierce, U.S. District Judge, United States District Court for the Southern District of New York, rendered after a two-week bench trial. (A22-A23)* The District

* The following citation forms will be used in this brief:

- | | |
|------------|--|
| (A) | Joint Appendix |
| (Op) | Opinion and Order (S.D.N.Y., July 19, 1977)
(A24-A75) |
| (DX), (PX) | Defendant's Trial Exhibit, Plaintiff's Trial
Exhibit |

The Opinion and Order will be cited both to the Joint Appendix and to the Opinion and Order itself. Exhibits will be cited both to the Joint Appendix and to their trial identification. The trial transcript will be cited only to the Joint Appendix.

Facts stated herein are either part of the District Court's findings of facts or are supported by evidence in the record. Where the District Court made a contrary finding, that is noted.

Court awarded damages to the plaintiff in the amount of \$1,576,595 on equitable theories of recovery, *i.e.*, estoppel to deny a contract and a contract implied in law.

The litigation arose out of events during the spring and summer of 1970, when the Executive Office of the President of the United States developed and implemented a plan (the "May 5 Plan," since announced on that day) to relieve emergency power shortages in various parts of the United States. A key component of the May 5 Plan was reduction by the then Atomic Energy Commission ("AEC")* of its massive power consumption at its gaseous diffusion uranium enrichment plants. Pursuant to this Plan, the White House in July 1970 decided that the AEC would release the right to 200 megawatts ("MW") of power contracted for by the AEC for use in its uranium enrichment facilities in order that the power could be transmitted to defendant-appellant Con Edison, which had suffered a breakdown of its largest electric generating unit, Ravenswood No. 3 (known as "Big Allis"). A White House press statement announcing this step (and saying nothing about recovery by the AEC of a "surcharge" for any additional costs purportedly incurred in connection with such a reduction) was released on July 23, 1970. A few weeks earlier, in early July 1970, the AEC, also pursuant to the May 5 Plan, had reduced its power consumption by 450 MW for use in Chicago and other areas of the country (but not New York). The AEC had not even attempted to charge a surcharge on the 450 MW release, which was still in effect on July 23.

Discussions leading to release of the 200 MW and culminating in the press release had been initiated by the Executive Office of the President, *i.e.*, by David Freeman, an official there, who contacted Con Edison shortly after the plaintiff became aware of the Ravenswood breakdown to

* On January 19, 1975, the AEC was abolished and its functions were transferred to two newly organized agencies, the Energy Research and Development Administration ("ERDA"), and the Nuclear Regulatory Commission. Exec. Order No. 11,834, 3A C.F.R. 111 (1975), *reprinted in* 42 U.S.C.A. § 5810 (1977). Reference to the AEC in this brief includes ERDA.

inform Con Edison of the availability of power pursuant to the May 5 Plan. After the White House press release, but before the power was actually released, an official of the AEC told the Chairman of Con Edison, Charles F. Luce, that the AEC expected Con Edison to pay a surcharge based upon increased costs resulting from the lower power level at which the AEC's enrichment facilities would operate after the reduction, though the AEC had not yet calculated the amount of such costs.* Luce, who had been told by Freeman of the early July power release, emphasized that Con Edison would pay a surcharge only on the same basis as earlier recipients of power under the same Government plan. (A36, Op 13) Con Edison did not know that the earlier recipients had not even been asked to pay a surcharge by the AEC, nor was that fact told to Luce at that time. Con Edison was told, shortly after this conversation, by other sources (which later proved erroneous) that the recipients of the previous release of power were paying a surcharge equal only to about 10-20% of the cost of the power. On or about July 27, 1970, the 200 MW reduction went into effect, and the AEC's power suppliers, Tennessee Valley Authority ("TVA") and Ohio Valley Electric Corporation ("OVEC"), began diverting the 200 MW to New York.

On August 6, 1970, or approximately two weeks after it began to receive the power, Con Edison learned from the utilities through which billing for the cost of power was being effected that the AEC was claiming a surcharge of over 100% of the cost of the power itself, that the previous recipients were in fact not paying any surcharge and had not even been asked to pay one. Con Edison immediately protested to the AEC the imposition of the surcharge which the AEC was claiming and by telegram notified TVA and OVEC, through whom the AEC was billing the surcharge, that the claimed surcharge by the AEC was

* Con Edison was to pay the power suppliers, not the AEC, for the power.

only "proposed" and that the utilities should not accept any such surcharge without Con Edison's express consent. (A2080-A2081, DX H-4) Con Edison sent the AEC copies of these telegrams. (A1012; A2282) Thereafter, Con Edison advised the AEC repeatedly that it would only pay a surcharge to the extent that the previous recipients of power paid a surcharge, as Luce had stated in the conversation on July 24.

After July 24 and unknown to Con Edison, the AEC entered into letter agreements with TVA and OVEC which modified the AEC's long-term contracts with them so as to effect the 200 MW reduction. Under the terms of these letter agreements, the AEC reserved the right at any time in its discretion to terminate the release. Despite this right of the AEC and despite Con Edison's continued insistence that it would only pay what the earlier recipients of power would agree to pay, the AEC continued the power release until October 1, 1970.

Pursuant to statute and regulations, the AEC was and is required to recover from the customers of its uranium enrichment program the costs incurred in such program. Plaintiff admits that the alleged additional "costs" incurred because of the 200 MW release have accordingly been factored into its charges for enriched uranium, so that such costs have been (or are being) passed along to those customers. In addition, the net effect of the 200 MW reduction was to reduce AEC's expenses in 1970, with a concomitant decrease in production of enriched uranium that year. However, the reduced production did not result in reduced revenues that year since the AEC was able fully to meet the demand for enriched uranium. In fact, during the years preceding and succeeding 1970, the AEC's excess stockpile of enriched uranium (known as "pre-production inventory") has been generally increasing. Thus, the reduced production in 1970 has yet to have any real impact. Moreover, the price charged enrichment customers contains a 15% contingency factor which more than adequately covers any alleged costs in the case.

The complaint, filed on July 22, 1974, alleged four separate causes of action: (1) breach of an express contract between the AEC and Con Edison; (2) breach of written contracts between the AEC and the power suppliers, who, it was claimed, were agents of Con Edison; (3) breach of a contract which Con Edison was estopped to deny; (4) and recovery by virtue of a contract implied in fact and a contract implied in law. The second cause of action was abandoned by plaintiff prior to trial, and that part of the fourth cause of action which alleged a contract implied in fact was dismissed by the District Court prior to trial. At trial, at the conclusion of the plaintiff's case, the District Court dismissed the first cause of action, based on express contract, as barred by the applicable Statute of Frauds.

On July 19, 1977 the court entered an opinion and order finding that Con Edison was liable to plaintiff for damages of \$1,576,595.00 on each of three theories: (1) that Con Edison and plaintiff had entered into a valid contract whose nonenforceability Con Edison was estopped by its conduct from pleading; (2) that Con Edison had been unjustly enriched when it received the power, thus entitling the AEC to a quasi-contractual recovery measured by the costs it incurred in releasing the power; and (3) that the AEC, under emergency conditions, had fulfilled Con Edison's duty to provide the New York area with electricity. The District Court viewed this third theory as being included within the contract-implied-in-law language of the fourth cause of action. The Court refused to award prejudgment interest to plaintiff.

ISSUES PRESENTED FOR REVIEW

1. Is Con Edison estopped from asserting the nonenforceability of an alleged oral agreement to pay a surcharge to the Government despite the facts that Con Edison made no representation that it would unconditionally pay a surcharge, that the Government did not rely on any representation by Con Edison, and that any alleged reliance

was neither reasonable nor resulted in a detriment to the Government? (Point I)

2. If Con Edison is estopped from invoking the Statute of Frauds, did a valid contract exist between Con Edison and the Government despite the facts that the Government's performance could not have been consideration for Con Edison's alleged promise to pay a surcharge, the telephone conversation found by the District Court to constitute the contract lacked essential terms, and Con Edison never accepted the offer allegedly made during that conversation? (Point II)

3. If a valid, enforceable contract existed between the parties, did Con Edison thereby agree unconditionally to pay a surcharge? (Point III)

4. Was Con Edison unjustly enriched by the receipt of power for which it paid fair market value, and thereby rendered liable in quasi-contract for a wide range of costs allegedly incurred by the Government in conferring the alleged enrichment? (Point IV)

5. Did the Government fulfill, under emergency conditions, an absolute duty of Con Edison to supply power to the New York City area and thereby render Con Edison liable for the costs that the Government allegedly incurred in providing such power? (Point V)

6. Did the Government, by its unjustified discrimination between Con Edison and other recipients of power under a program of emergency assistance, deny Con Edison equal protection of the laws? (Point VI)

7. Is the Government, by eliciting a conditional promise to pay while leading Con Edison to believe that others had paid a surcharge and by continuing to supply Con Edison with power after Con Edison repudiated its alleged obligation to pay a surcharge, estopped from imposing a surcharge upon Con Edison? (Point VII)

8. Is the Government precluded from seeking any equitable relief when it not only imposed a surcharge upon Con Edison in an arbitrarily discriminatory manner but also elicited Con Edison's conditional promise to pay while concealing that others had paid no surcharge? (Point VIII)

9. Did the Government prove any damages in light of the statutory requirement that the AEC pass on its costs to customers of the uranium enrichment process and the fact that the Government's calculation of the price charged its enrichment customers for enriched uranium contains a 15% contingency factor more than sufficient to cover all "additional costs" related to the 200 MW reduction? (Point IX)

10. Did the Government prove any damages in view of its failure to consider many factors bearing upon the actual economic impact of the 200 MW reduction? (Point IX)

11. Did the District Court properly award damages based upon diverse kinds of AEC costs, including such unrelated items as payments in lieu of taxes to local communities, in view of the limited description of "costs" in the July 24 telephone conversation between Luce and Quinn? (Point IX)

STATEMENT OF FACTS

The May 5 Plan

During the winter and spring of 1970, the White House initiated and supervised development of an emergency program designed to alleviate shortages of electric power expected during the coming summer. (A25-A26, Op 2-3) The program originated on February 2, 1970, when H. R. Haldeman, then President Richard Nixon's Chief of Staff, wrote a memorandum to General George Lincoln, the then Director of the Office of Emergency Preparedness ("OEP") within the Executive Office of the President, stating that Haldeman had been advised of the likelihood of power short-

ages during the coming summer and asking Lincoln to investigate and report on the matter. (A1816, DX A) In March 1970, after initial investigation, Lincoln set up a meeting of representatives from each agency or department concerned with energy or power problems, including the AEC, in order to discuss further the problems anticipated for the summer and to formulate plans for dealing with them. (A180, A184-A186; A26, Op 3) In addition, Lincoln established a working group, chaired by David Freeman of the Office of Science and Technology ("OST") within the Executive Office of the President and composed of representatives from each of the agencies and departments concerned, including the AEC, to draft a paper on the question raised by the White House. (A186; A1507, PX 1; A1826-A1828, DX G; A1829-A1830, DX H) At an early stage in the proceedings of the working group, it became apparent that a key component of the plan would be reduction by the AEC of its massive power consumption at its gaseous diffusion uranium enrichment facilities in case of need. (A26, Op 3)

As a result of the deliberations of the working group, a plan for alleviating possible energy shortages was prepared, as well as a "Survey of Electric Power Problems." (A1943-A1962, DX M-2; A1984-A1985, DX Q-2) AEC representatives participated in the formulation of the Plan and the Survey and were given several opportunities to suggest changes. (A186, A201-A204, A207-A209; A26, Op 3; A1826-A1828, DX G; A1843-A1848, DX K; A1887-A1892, DX V; A1893-A1894, DX W; A1930-A1940, DX K-2; A1941-A1942, DX L-2; A1963, DX N-2) Both the Plan and the Survey were submitted to the White House, where the President, by means of a memorandum from his Assistant, Peter M. Flanigan, specifically authorized Lincoln to issue the plan and to initiate the actions indicated therein. (A1879, DX T)

The May 5 Plan was in fact issued on May 5, 1970, together with the Survey. (A1984-A1995, DX Q-2) The Plan contained the following provision concerning the AEC:

"The AEC will make arrangements to curtail production this summer at the AEC gaseous diffusion plants, which use large amounts of electricity. This could release coal supplies and generating capacity which could be used to assist in meeting fuel shortages and peak loads of the consuming public in parts of the inter-connected system. The diffusion plants are being used, in part, to produce enriched uranium for future use in nuclear power plants." (A1986)

The statement contained no reference, express or implied, to the imposition of a "surcharge" in connection with the proposed release of power. (A26-A27, Op 3-4) Although the AEC had suggested several changes in the language of the May 5 Plan, none of them concerned a "surcharge". (A201-A203)*

General Lincoln sent copies of the May 5 Plan and the Survey to Glenn T. Seaborg, Chairman of the AEC, on May 5, 1970. In the cover letter accompanying the Plan and Survey, Lincoln stated, "[P]lease take the necessary steps to implement these measures," and requested monthly progress reports regarding the program. (A1984, DX Q-2) By reply letter of May 22, 1970, Seaborg advised Lincoln of the preliminary steps taken by the AEC pursuant to the May 5 Plan and concluded by stating:

"It is our understanding that the Executive Office of the President will advise us of any emergency situations in which we are to execute the plan to release power to our suppliers." (A1520, PX 4)

* The Survey which accompanied the Plan included an appraisal, by geographical area, of power generating capacity for the summer of 1970. The following specific reference was made to the situation in the New York City region:

"Statewide reserves equal 18%, but New York City reserves are not considered adequate. Consolidated Edison's reserves would be largely eliminated if its largest unit (1000 MW Ravenswood) goes out." (A1994)

David Freeman, the chairman of the White House working group, prepared a "Memorandum for working Group on Power Supply" dated June 10, 1970, in which he stated as follows:

"Curtailment of power at AEC's gaseous diffusion plants—Apparently there are 450 mw that can readily be made available to utilities in tight power supply areas. . . . Also, if greater curtailments could alleviate brownout possibilities, we should be informed and decisions promptly made." (A1893-A1894, DX W)

The AEC had previously informed Freeman that the 450 MW was available. (A1521-A1533, PX 5)

The AEC's Gaseous Diffusion Plants and Uranium Enrichment Services For Industry

In 1970 the AEC operated three gaseous diffusion plants for the production of enriched uranium, *i.e.*, uranium in which, by artificial means, there has been concentrated a higher percentage of the fissionable isotope U-235 than is found in nature. (A27, Op 4) The plants, located at Oak Ridge, Tennessee, Paducah, Kentucky, and Portsmouth, Ohio, were and still are operated primarily to produce fuel for nuclear power plants operated by civilian utilities which have entered into contracts with the AEC for such services. (A77-A78; A1667-A1679, PX 46) The unit measure of the amount of enrichment or "separation" work performed was and is called a "separative work unit," or "SWU". (A559, A566)

The price charged to customers of the enrichment activity (on a rate per SWU) was and is, by statute and regulation, based upon recovery, over a reasonable time, of the Government's costs. (A2477, DX C-11: Plaintiff's Answer to First Set Interrogatory 12) Such costs include: the cost of electric power and all other direct and indirect costs of operating the gaseous diffusion plants; depreciation of the

plants; and a factor to cover applicable costs of process development, AEC administration and other Government support facilities, and imputed interest on investment in plant and working capital. (A712-A713, A1372, A2477) The charge per SWU was \$26 from January 1, 1969 to February 22, 1971, and \$28.70 from February 22, 1971 to November 14, 1971. It was increased to \$32 on November 14, 1971. (A1667-A1679, PX 46) The charge for uranium enrichment includes a 15% contingency factor (A732; A2478-A2479, DX C-11) which includes such factors as unforeseen costs and production interruption, uncertainty of future costs of money and similar uncertainties and unforeseen events. (A733) The 15% contingency factor more than equals the AEC's claimed costs in this case. Indeed, in determining the charge for uranium enrichment in 1973, which included the alleged "costs" connected with the 200 MW reduction, the AEC, besides adding the 15% contingency factor, "rounded off" the cost from \$31.90/SWU to \$32.00/SWU, which rounding off itself more than covered the alleged losses in this case. (A2425, DX V-9; A2463, DX W-9)

In 1970, prior to the implementation of the May 5 Plan, the gaseous diffusion plants were using electrical power at a rate of approximately 2000 MW. (A78; A27, Op 4) During the early 1960s, the plants had operated at a level of 6000 MW, but because of lower demand for enriched uranium, the AEC decided in 1964 to begin reducing production, and hence consumption, of electricity; by 1969 the 2000 MW level had been reached. (A152-A154) This drop in consumption resulted in efficiency losses at the gaseous diffusion plants. (A224-A225)

In 1970, the AEC purchased the power for its enrichment activities under long-term contracts with three suppliers: TVA, OVEC, and Electric Energy, Inc. ("EEI"). (A78-A79; A27-A28, Op 4-5)

January 1970 Power Reduction

In January 1970, prior to development of the May 5 Plan, the AEC reduced the power consumption at its gaseous diffusion plants from 1900 MW to 1550 MW at the request of TVA (A73, Op 5n.1; A2321-A2322, DX D-8; A1879-A1882, DX T), which reduction plaintiff admitted was "similar to the one being litigated in this action." (A2467, DX C-11) In addition to repayment of the power, the AEC required TVA to provide at a later date an additional amount of power, or power "premium," equal to 10.4 percent of the actual power reduced. (A2321-A2322, DX D-8) This premium was imposed to "compensate the AEC for production losses sustained as a result of this emergency reduction" (A2469, DX C-11) and thus avoid the AEC's estimated efficiency and mixing losses, the same kinds of losses upon which the surcharge to Con Edison allegedly is based. (A2321-A2322, DX D-8; A226)

The 450 MW Drop Pursuant to the May 5 Plan

In early June 1970, the AEC by letter notified its three power suppliers of its participation in the May 5 Plan. (A2027-A2032) In discussing power reductions under the May 5 Plan, the AEC noted, "[I]t is assumed that we would be given full financial relief for the power and energy dropped under our contract and that the reduction would be sufficiently long in time (*e.g.*, weeks or months rather than hours) to justify the related mixing losses and other costs." (A2027, A2029-A2030, A2031) The AEC did not in these letters suggest that the utilities pay a surcharge to cover such losses and costs.

Thereafter, in early July 1970, pursuant to requests from its three power suppliers and advice from the Federal Power Commission ("FPC") and in accordance with the White House's May 5 Plan, the AEC reduced its consumption of power by a total of 450 MW for the remainder

of the summer. (A28, Op 5; A220-A221; A2035-A2036, DX C-3; A2045, DX I-3; A2059, DX N-3; A2060-A2061, DX O-3; A2062-A2063, P-3) This power was released in order to assist utilities facing anticipated shortages in Chicago and certain areas in the Midwest and East. (A1912-A1925, DX H-2; A2043-A2044, DX G-3; A2060-A2061, DX O-3; A223) The AEC entered into written modifications of the AEC's long-term supply contracts with each of its three suppliers with respect to these reductions. (A2046-A2051, DX J-3; A2052-A2056, DX K-3; A28, Op 5) These modifications contained no reference whatever to any "surcharge" claimed by the AEC, nor did the AEC otherwise request or even contemplate a surcharge on this 450 MW when it received the requests for power, when it initiated the reduction, or when it entered into the contract modifications. (A88, A249-A250; A29, Op 6) The 450 MW reduction reduced the power levels at the gaseous diffusion plants from 2000 MW to 1550 MW. (A2138-A2139, DX C-5)

The Ravenswood Outage

On or about July 21, 1970, Con Edison suffered an outage of its Ravenswood plant, with a resulting loss of approximately 1000 MW. (A29, Op 6; A796)

The White House Decision by July 23, 1970 to Provide New York With Power

Officials at the White House quickly became aware of the Ravenswood outage, and on July 22, 1970, David Freeman of OEP telephoned the offices of Con Edison to inquire whether the government could assist the utility pursuant to the May 5 plan. (A30-A31, Op 7-8; A801-A802, A899) Charles F. Luce, Chairman and Chief Executive Officer of Con Edison, returned Freeman's call the next morning. (A802) Freeman, after explaining the May 5 plan's provision for power reductions at the AEC's enrichment plants and noting that the AEC had already made a substantial reduction for other utilities, asked Luce whether Con Edison wanted whatever amount of AEC power re-

mained available. (A31, Op 8; A803) Luce responded that Con Edison wanted the power, provided that it could be transmitted to New York. (A31, Op 8; A803) Freeman then suggested that Luce contact George Quinn, the AEC's assistant general manager in charge of its production program, in order to find out the specific amount of available power and to make more specific arrangements for release of the power.* (A31, Op 8; A803-A804) During this conversation Freeman did not mention or in any way suggest that there might be a surcharge imposed in connection with the power to be released. (A804; A31, Op 8)

Other Events On July 23, 1970

After offering the AEC power to Luce, Freeman telephoned Quinn to advise him of the power shortage in the New York City area and that he should expect a contact from Con Edison concerning a further release of AEC power. (A261; A31, Op 8) Con Edison's Roddis placed the expected call to Quinn and asked whether it was feasible for the AEC to reduce its power consumption further, perhaps by as much as 300 MW. (A90, A267, A900, A902; A33, Op 10) Quinn informed Roddis that the AEC was looking into the matter and promised to call him back with an answer. Quinn did not mention a surcharge to Roddis during this conversation. (A268; A33, Op 10) At about the same time that Roddis spoke to Quinn, Luce of Con Edison telephoned Fred Chambers, TVA's assistant manager of power, primarily to inquire regarding the availability of TVA power. (A805) Luce also asked Chambers for details concerning the character of the AEC power and its transmission to New York City. (A806-A807) When Luce asked Chambers whether the AEC would shut down its entire

* Louis Roddis, then President of Con Edison, tried to reach Freeman on the 23rd, but spoke to his assistant, Fred Weinhold. Weinhold also said the government was prepared to make the power available, asked how much Con Edison could take, and suggested that Roddis speak to Quinn. (A900)

enrichment operation, Chambers expressed an opinion that such an action would be very expensive.* (A807)

After his conversations with Freeman and Roddis, Quinn contacted a Mr. Voigt in the AEC's Division of Production to discuss the feasibility of a further reduction of power. (A262) Voigt advised Quinn that a further reduction had been under study and appeared possible. (A262-A263) Quinn then reported the situation to E. H. Bloch, the Acting General Manager of the AEC, and briefly discussed with him the staff's opinion that the AEC should obtain a surcharge on the contemplated reduction. (A263, Op 8) However, Quinn did not discuss with Bloch the amount of the surcharge or the implications of the AEC not having imposed a surcharge on the earlier 450 MW reduction. (A265, Op 8) Quinn also contacted S. R. Sapirie, the operations manager of the AEC's Oak Ridge plant, to discuss the feasibility of a further reduction and possible difficulties in transmitting the released power to New York. (A268-A269) Quinn did not recall discussing a surcharge with Sapirie at this time. (A269)

Freeman again communicated with Quinn on July 23 to inform him that the White House intended to issue a press release announcing the forthcoming AEC reduction

* Chambers testified, and the court found, that Chambers had two conversations with Luce on July 23rd, and that during the second he told Luce that power released by the AEC would be "pretty expensive . . . because the AEC does have an efficiency factor," and "this can turn out to cost you 12 or 14 mills a kilowatt hour." (A393; A32-A33, Op 9-10) Luce testified that Chambers did not advise him of any extra AEC costs. (A807-A808) Chambers and Luce also discussed the possibility of starting up an old TVA steam generating plant known as Watts Bar, and Chambers also characterized this as "expensive" power. (A32, Op 9; A397) Chambers' testimony, to the extent it is in conflict with that of Luce, is of questionable weight. For example, Chambers testified he did not recall any telephone calls with Arthur Hauspurg of Con Edison at this time, whereas Hauspurg testified as to several such conversations and indeed still had the notes from them. (A944-A945, A952-A954, A956-A957; A2250, DX R-6) Similarly, Luce had notes from his discussion with Chambers, but Chambers did not. (A419; A808)

of power to assist New York City. (A273) During this conversation, according to Quinn's testimony at trial, he informed Freeman that the AEC intended to impose a surcharge on this power.* (A273) Quinn did not, however, advise Freeman of the amount of the surcharge, the fact that no surcharge had been obtained or requested from the earlier recipients of power under the May 5 Plan or the fact that nobody had mentioned a surcharge to Con Edison. (A290-A291) Freeman did not respond to Quinn's statement on a surcharge. (A290) When Quinn expressed an interest in knowing the exact contents of the White House press release, Freeman suggested that Quinn speak to one Mr. Kriegsman, a staff assistant to the President. (A274, A280) Although Quinn testified that he advised Kriegsman that the AEC intended to obtain a surcharge, he did not suggest that language regarding it should be placed in the press release, nor did he discuss the amount of the surcharge, the fact that the earlier recipients had not paid or been requested to pay one, or the fact that not a word about a surcharge had yet been communicated to Con Edison. (A280-A283) Kriegsman made it clear to Quinn during this conversation that the President was directing the AEC to make the power available to New York City. (A280-A281, A285-A286; A34, Op 11)

Quinn also spoke with Clarence Larson, one of the AEC Commissioners, who told Quinn that any public announcements to be made in connection with a further reduction of AEC power would originate with the White House, not the AEC. (A271) Later that day, when Quinn advised Sapirie that the White House would make an announcement concerning the reduction, Quinn acknowledged that the decision to release the power had been taken from the hands of the AEC. (A292-A293)

Roddis of Con Edison telephoned Freeman to advise him of Con Edison's progress in arranging for transmission

* During Quinn's deposition taken on November 21, 1974, two years closer to the actual events, he could not recall having discussed a surcharge with Freeman on July 23rd. (A276, A278)

of the AEC power. (A899-A900; A33, Op 10) In Freeman's absence, Roddis spoke with his assistant, Fred Weinhold, who reaffirmed that the government was prepared to make the power available. (A899-A900) At some time on July 23, the AEC determined that it would be feasible to reduce its consumption of power by a further 200 MW. (A91)

The July 23 White House Press Release

Late in the afternoon of July 23, 1970, the White House issued the press release about which Quinn had been consulted earlier in the day. (A2064-A2065, DX R-3; A34, Op 11; A296-A298) It read as follows:

"The President announced today that the Atomic Energy Commission will make available several hundred megawatts of power to the Consolidated Edison Company serving New York City.

"This action is being taken to help relieve the critical power shortage in New York City created by the failure of its largest generating unit on July 21.

"This release of this power is pursuant to the contingency plans previously developed and announced by the Office of Emergency Preparedness on May 5.

"The power would be made available by reducing the use of electricity at the AEC's gaseous diffusion plants. The Consolidated Edison Company is proceeding with the necessary arrangements with the other utility companies involved and the AEC.

"It is expected that the power will be transmitted to New York over the interconnected grid system of the utilities in the eastern United States." (A2064-A2065, DX R-3)

Prior to the release, which itself contained no reference to a surcharge, neither the AEC nor the White House had advised Con Edison that the AEC intended to seek a surcharge, even though Con Edison was consulted on the contents of the release. (A295-A296)

Roddis, as he was about to appear on the evening television news, saw the text of the White House announcement on a broadcast tape and publicly thanked the government for its assistance. (A901) Luce saw newspaper articles on the press release in the morning papers on July 24. (A814)

**The July 24 Telephone Conversation
Between Quinn and Luce**

On July 24, 1970, Quinn placed his promised return call to Roddis at Con Edison, but spoke to Luce in the absence of Roddis. (A36, Op 13) Quinn informed Luce that the AEC already had reduced its power consumption by 450 MW earlier in the summer for other utilities and was now prepared to make a further reduction of 200 MW if Con Edison required the power and if the power could be transmitted to New York City. (A36, Op 13; A307-A308) Luce responded, as he had to Freeman the day before, that Con Edison wanted the power if it could be transmitted to New York.* (A820) Quinn mentioned that a reduction would reduce the efficiency of the AEC's gaseous diffusion plants and that Con Edison consequently would be looked to to pay a surcharge. (A36, Op 13; A308, A819) Luce, who believed that the utilities that had received the first 450 MW would not have paid an excessive price, responded that Con Edison would be willing to pay whatever surcharge had been paid by the earlier recipients.** (A36, Op 13; A819; A881) Quinn did not state the amount of the surcharge, but pointed out that the losses associated with this 200 MW would be higher than those associated with the first 450 MW. (A309, A863; A37, Op 14) Luce then reiterated that it would not be appropriate for Con Edison to pay a charge different from that imposed on the prior

* Quinn testified, and the court found, that Luce stated that because of transmission difficulties he was not yet in a position to request the power. (A308; A36, Op 13)

** Quinn testified that Luce did not make this statement, but the Court found otherwise. (A314; A36, Op 13)

recipients of power. (A864-A865) At no time during this conversation did Quinn inform Luce that those recipients had not been asked to pay a surcharge, nor did he otherwise dispute Luce's insistence on equal treatment. (A37-A38, Op 13-14; A311-A312, A821) Following this conversation, Luce assigned Arthur Hauspurg, then a Con Edison vice president, the task of making whatever arrangements were necessary for transmission of the power. (A822-A823)

**The Power Reduction, the AEC's Letter Agreements
With OVEC and TVA, and Other Events
Prior to August 6, 1970**

On July 27, 1970, the AEC reduced its consumption of power by 200 MW and continued the reduction until October 1, 1970. (A39, A46, Op 16, 23) Con Edison paid its adjacent utilities for the power itself on the basis of the production cost of the electricity at point of origin plus costs of transmission to New York. (A1788, PX 48) The cost of the power itself plus transmission charges to Con Edison was 7.85 mills per kilowatt hour. (A980; A1788, PX 48) On July 28, members of the AEC calculated a surcharge figure of 5.41 mills per kilowatt hour, *i.e.*, about 104 percent of the cost of the raw power. (A42, Op 19; A100, A333; A2072-A2073, DX X-3) The AEC did not, however, communicate this figure to Con Edison. (A38, A43, Op 15, 20) Rather, Quinn directed Sapirie to recover the surcharge through the AEC's supplier utilities.* (A2074, DX Z-3) Accordingly, in August, the AEC entered into letter agreements with TVA and OVEC which modified its long-term contracts with them by formalizing the 200 MW reduction and providing that the utilities would arrange for payment

* Quinn directed that this be done although he had not, in his discussion with Kriegsmann or otherwise with anyone at the White House, raised the question of whether the surcharge was consistent with the May 5 Plan, or the fact that the recipients of the 450 MW reduction had not even been asked to pay a surcharge; nor did Quinn himself consider these matters at that time. (A281-A282, A351)

of the 5.41-mill surcharge by Con Edison to the AEC. (A1546-A1547, PX 15; A1548-A1549, PX 16; A1550-A1551, PX 17)* Each of the letter agreements provided that the AEC might terminate the power reduction at any time and for any or no reason. Con Edison was not a party to these agreements, did not receive copies of them, and did not learn of their existence until well after October, 1970. (A342, A903, A959) The letter agreements executed by TVA specifically provided that TVA would have no obligation to make any surcharge payment to the AEC until such payment had first been made to TVA (A1548, PX 16; A1550, PX 17), but the letter agreement with OVEC did not contain that provision. (A1547, PX 15)

Early in the week of July 27, 1970, Luce sent a telegram to President Nixon expressing the appreciation of Con Edison and its nine million customers for "the manner in which *your office* has responded to the power shortage in New York City by making available 200,000 KW of AEC power . . ." (A826-A827; A2251-A2252, DX U-6) (emphasis supplied) Copies were sent to Freeman and to the Federal Power Commission. (A2251)

From July 24 until August 6, Con Edison did not inquire of the AEC concerning the amount of the surcharge because on or about July 24 Arthur Hauspurg, then a Con Edison Vice President, had been told by Ted Nagel of American Electric Power Service Corporation that Nagel believed there was a 10 to 20% surcharge on a previous release of power by the AEC.

The 5.41-mill surcharge calculation was based upon a reduction lasting 92 days. (A2072-A2073, DX X-3) At the time the surcharge was calculated and billed, however, the AEC did not know how long the reduction would be in effect, and Quinn, at least, did not believe that Con Edison would

* The TVA letter agreements were approved by the TVA Board of Directors on August 13, 1970 (A1549; A1551); the OVEC letter agreement was approved by OVEC on August 7, 1970. (A1549)

use the power that long. (A340, A343) In fact, Con Edison took the power for only 66 days, from July 27 through October 1. (A39, A46, Op 16, 23) The 5.41-mill figure also failed to account for the fact, known by the AEC at the time of its calculations, that before October 1 the recipients of the earlier released 450 MW would return most of that power, thus raising the AEC's power level and significantly reducing the alleged efficiency losses caused by the 200 MW released and still flowing to Con Edison. (A343-A348)

August 6, 1970

On August 6, 1970, Roddis of Con Edison learned from the adjacent utilities transmitting the power to New York that the AEC was attempting to impose a surcharge of 5.41 mills per kilowatt hour. (A903; A43, Op 20) Roddis called Tom Ayers, President of Commonwealth Edison in Chicago, to find out precisely how much of a surcharge Commonwealth was paying for its share of the initial 450 MW; Ayers told Roddis that Commonwealth was paying none whatsoever. (A44, Op 21; A904-A905) Roddis then had two or three telephone conversations with Quinn and his assistant, protesting both the amount of the surcharge and the fact that Con Edison had been singled out to pay it. (A44, Op 21; A904-A906)

Events Later in August 1970

In telegrams dated August 10, 1970, Con Edison advised TVA and OVEC, through the American Electric Power Company (its principal stockholder), as follows:

"Loss of production surcharges proposed by Atomic Energy Commission in connection with power you are furnishing to us are to be subject of discussions between us and AEC. We request that you do not accept any such inefficiency surcharge without our consent and that you refer them to us for advice." (A2080-A2081, DX H-4)

The AEC became aware of the substance of these telegrams by August 13, 1970, at the latest. (A443-A444; A2087, DX K-4)

Also on August 10, Bertram Schwartz, then a Con Edison Vice President, met with Quinn and other AEC staff members in Washington to discuss the surcharge. (A44, Op 21; A1006-A1007) Quinn showed Schwartz two pages of calculations and used them to explain the method used to arrive at the surcharge. (A1544, PX 13; A110, A1007, A1010) Schwartz remarked that Quinn probably had in mind several alternative methods for calculating the surcharge, but Quinn only smiled in response. (A110, A438, A1008) When Schwartz confronted Quinn with the AEC's failure to exact a surcharge from the recipients of the first 450 MW released, Quinn did not attempt to justify the unequal treatment and readily admitted that the AEC had simply "goofed." (A45, Op 22; A440, A1009) Schwartz firmly expressed his view that it was improper for the AEC to impose a surcharge on the 200 MW. (A1009)

From August 10, 1970, Con Edison's position remained clear and firm: it would pay a surcharge only if treated equally with the recipients of the first 450 MW. (A45, Op 22) Roddis, who was in Washington on August 19, presented a draft letter (addressed to Quinn) to the White House stating this position (the letter was forwarded by the White House to the AEC). (A2340-A2348, DX K-8; A914-A917) On August 20, when Quinn telephoned Luce to discuss the surcharge issue, Luce expressed his view that the government had volunteered the power to Con Edison and again emphasized that Con Edison should pay a surcharge only on an equal basis with prior recipients. (A116, A455-A458, A833-A835; A1563-A1564, PX 27)*

Prior to Con Edison's initial protests, the AEC had not even considered imposing a surcharge on the first 450 MW. (A249-A250) But on August 11, 1970, the AEC

* Quinn acknowledged the accuracy of PX 27 at trial. (A139)

requested that its staff attempt to negotiate an appropriate surcharge with the recipients of that power. The AEC sent letters to TVA, OVEC, and EEI on August 28, 1970 requesting such a surcharge. (A2110-A2116; A45, Op 22; A1552, PX 19; A433-A435) As the AEC had expected from the beginning, TVA, OVEC and EEI rejected these requests in September. (A1552, PX 19; A45, Op 22; A112-A114; A2150, DX D-5; A2160-A2162, DX G-5)

The September 1, 1970 Meeting

On September 1, Luce and two other Con Edison officers travelled to Washington to meet with Quinn and other AEC staff members. (A837) Among other topics, the parties discussed the origin of the 200 MW reduction and the basis for calculation of the surcharge. Luce again stated Con Edison's position: namely, that Con Edison would pay, but only if the other recipients paid. (A483-A487, A837-A841, A1021-A1026) The AEC staff members stated that they were attempting to persuade the recipients of the 450 MW to pay a surcharge. The AEC presented tables containing two alternative calculations of the surcharge, one higher and one lower than the original 5.41 mills/KWH figure. (A2137-A2149, DX C-5) In response to a query by Quinn, Luce stated that Con Edison intended to continue taking the power through September 30. (A484-A485) The meeting ended without an agreement on the surcharge. (A1024)

Events After September 1, 1970

On or about September 11, 1970, Quinn called Schwartz of Con Edison to propose a surcharge of 3.88 mills per kilowatt hour, but Con Edison rejected this because the other recipients still had not paid any surcharge. (A1018-A1019)

Despite its awareness of Con Edison's position and the high improbability of receiving a surcharge from the recipients of the 450 MW, the AEC continued to provide the 200 MW to Con Edison through October 1, 1970 (A46, Op 23) although by the terms of its contracts with OVEC and TVA, the AEC could have terminated the reduction

at any time. (A1546-A1547, PX 15; A1548-A1549, PX 16; A1550-A1551, PX 17)

Quinn and Luce exchanged letters dated September 22, and September 30, 1970, respectively, again stating their opposing positions. (A1557-A1560, PX 25; A1565-A1568, PX 28) Quinn then suggested a meeting between counsel for the parties. (A1569-A1574, PX 29)

In February 1972, W. H. Henderson, then Director of Finance of the AEC, prepared a memorandum outlining three different methods of calculating a surcharge for the 200 MW—including one based on methodology essentially the same as proposed by plaintiff at trial and another based on an "average" surcharge taking into account the fact that two reductions were in effect simultaneously—in which Henderson concluded that the latter was "recommended" and that the former was "not a valid method." (A567-A568; A2222, DX D-6)

Not until April 1977, on the eve of trial and almost three years after the Government filed its complaint, did the Government finally prepare the figures purporting to support the surcharge amount awarded by the District Court, *i.e.*, PX 41. (A1590-A1602; A598) The Government's figures include costs for such diverse items as the AEC's payments to local communities in lieu of taxes ("community support") (A1601), security investigations on AEC personnel (A1601), warehousing (A1601), research and development (A1601), recovery of scrap from the gaseous diffusion plants (A1600), and the cost of distributing power among the plants (A1600), although the discussion between Quinn and Luce on July 24 was in terms of certain costs, such as blending losses and efficiency losses, and did not encompass the diverse categories included by the Government in PX 41.

**October 1970 Power Reduction
by the AEC for TVA with "Power
Premium" Payment**

At the time the 200 MW release to Con Edison was ending, October 1, 1970, TVA requested that 150 MW of power

be released to it. This power reduction was in effect from October 1, 1970 through October 31, 1970. TVA paid a power premium of 14%. (A2179-A2180; Pl. Ans. to Second Set Interrog. 1, p.4) The power surcharge was intended to "offset AEC's production losses and costs." (A2179)

Con Edison's Use of the 200 MW

Con Edison did not need the 200 MW on a continuous basis since consumer power demand dropped very sharply at night, but the AEC could not release the power except on a continuous basis. Because it had to take the 200 MW continuously, Con Edison was forced not to use some of its own cheaper electrical generating capacity at night. (A946-A949) Con Edison did not recover from its customers the full cost of the 200 MW (i.e., the cost of the raw power plus transmission charges exclusive of any surcharge) and cannot be said to have profited from the receipt of this power. (A980-A989, A1081) Con Edison paid 7.85 mills per kilowatt hour for the 200 MW. (A980) The average cost of fuel during the period Con Edison received the 200 MW was 5.9 to 6.5 mills per kilowatt hour. (A980) Since Con Edison recovers from its customers only the average cost of its fuel, the unrecovered cost to Con Edison arising out of the receipt of the 200 MW was approximately \$631,000. (A978-A979) The receipt of the 200 MW did, however, give Con Edison additional power to sell, which offset the additional costs entailed in the receipt of the power. (A982-A983) These additional revenues obtained in the course of the sale of the 200 MW amounted to approximately \$595,000, an amount nearly offsetting the losses, but not resulting in a gain. (A983)

The Cost of Emergency Power In The Industry

Con Edison was in 1970 and is a party to an agreement among member utilities of the New York Power Pool.

(A2288-A2315, DX B-8) By the terms of this agreement, one member utility will supply emergency power to another based on the cost of the power plus 10 percent of the cost. (A936; A2288-A2315, DX B-8) This price is standard in pool agreements throughout the United States and in agreements between pools, and it is regarded as the general industry practice. (A890, A941)

**The AEC's Costs and Revenues In
Relation to the 200 MW Reduction**

According to the plaintiff's computation of alleged damages as presented at trial, plaintiff's actual costs paid out during the period of the reduction (and hence in fiscal year 1971) were in fact about \$1.4 million less than they would have been had there not been the reduction. (A1590) This results from the fact that, because of the power reduction, the AEC did not have to pay for about \$1.4 million of power, while its other costs remained constant regardless of the reduction. (A1591-A1592, A1597-A1601) At the same time, the AEC's revenues in fiscal year 1970 were unaffected by the reduction, since all existing demand for enriched uranium that year was met. (A725-A726) Indeed, the AEC's inventory continued to increase. At the time of trial the amount of enriched uranium in pre-production inventory had risen to about 28 million SWUs (A729) from about 16 million as of June 30, 1970. (A1676)

**Inclusion of "Costs" Related to
200 MW Reduction in Price Charged
Uranium Enrichment Customers**

Pursuant to statute and regulation, the AEC calculated a price for enriched uranium so as to recover its costs, including those attributable to the 200 MW reduction, from its uranium enrichment customers over a period from 1971 to 1980. (A712-A715; A2480-A2481, DX C-11: Plaintiff's Answer to Interrogatories 13 and 14) Consequently, the AEC will by 1980 have fully recovered the costs from its enrichment customers. (A715)

The enrichment customers from now until 1980 will not necessarily be the same as those from 1971 to the present. (A726 A739) The AEC has not entered into any agreements or documentary commitments to pass along any recovery in the present case to its enrichment customers. (A736)

ARGUMENT

I. Con Edison Is Not Estopped From Invoking The Statute Of Frauds

The District Court held that Con Edison is estopped from asserting the nonenforceability of any agreement to pay a surcharge because the Government reasonably relied to its detriment on Con Edison's representations that it would pay a surcharge. (A55-A59, Op 32-36) It is respectfully urged that these conclusions are erroneous because (1) Con Edison did not represent to the AEC it would pay the surcharge as assessed by the AEC; (2) any such alleged representation did not induce any such reliance by the plaintiff; (3) any reliance by the plaintiff would have been unreasonable; and (4) any such reliance was, in any event, not to the AEC's detriment.

A. Con Edison Did Not Represent That It Would Pay A Surcharge As Assessed By The AEC

The District Court found that on July 24, 1970, during Charles Luce's initial conversation with George Quinn concerning release of the 200 MW, "Luce stated that Con Edison would be willing to pay whatever surcharge had been paid by the recipients of the previous 450 MW reduction." (A36, Op 13) In its Conclusions of Law, however, the District Court found that Con Edison simply represented that it would reimburse the AEC for its costs and "upon learning the extent of those costs, Con Edison altered its position and stated that it would pay only if the recipients of the

450 MW paid." (A56, Op 33) The Court's analysis of the estoppel issue in its Conclusions of Law is clearly inconsistent with its finding of fact on this point. Since, as the District Court found, Luce stated his "equal treatment" condition on July 24th, there simply was no change of position later. Con Edison submits that the District Court was correct in its finding of fact and erroneous in its later analysis.* Con Edison's representation to the AEC was not that it would pay any surcharge, but that it would pay whatever other recipients had paid. Quinn himself admitted that Luce never stated that Con Edison would pay any surcharge imposed by the AEC or even that Con Edison would pay the surcharge at all. (A314) In short, Con Edison simply never made a representation that it would reimburse the AEC for its costs in any manner that the AEC might determine them.

The District Court also concluded that Con Edison "represented" that it would pay the AEC's costs by accepting the 200 MW with knowledge that the amount of the surcharge was subject to later calculation by the AEC. (A57, Op 34) This analysis, too, fails to take account of the District Court's finding of fact that Luce only agreed to pay what the previous recipients paid. (A36, Op 13) Con Edison's acceptance of the power cannot be considered in a vacuum; the conversation constituting the alleged rep-

* The District Court's finding of fact on this point is supported not only by Luce's testimony (A819), but by various documents (most prepared by plaintiff) which reflect Luce's recollection of the July 24th telephone conversation and to which Quinn, although he had the opportunity, took no exception. (A1557-A1560, PX 25; A1563-A1564, PX 27; A2340-A2348, DX K-8; A2414-A2418, DX Q-9) Thus, for example, Luce in his August 20 telephone conversation recalled that he had made the point about equal treatment during the July 24 telephone conversation, but Quinn did not on August 20 take exception to Luce's recollection. See PX 27. (A1563-A1564) Quinn testified at trial that PX 27 was an accurate summary of the August 20 conversation, except for two points not here relevant. (A130-A131)

resentation and the circumstances surrounding the acceptance, namely the May 5 plan and the White House offer, must be examined and considered.

Furthermore, estoppel based upon acceptance of benefits is premised on the ground that such acceptance is inconsistent with the denial of the alleged agreement. The doctrine does not apply where there is no inconsistency between a party's assertion and its acceptance of benefits. See *Maryland Casualty v. United States for Use of Green*, 169 F.2d 102, 113 (8th Cir. 1948). There is no such inconsistency in this case. Con Edison's receipt of the power while denying an extremely large, discriminatory surcharge was consistent with the position it had asserted on July 24: it would pay a surcharge only on the same basis as the recipients of the earlier 450 MW release.* Con Edison knew that the White House had made the power available to it pursuant to the May 5 Plan, as early as July 23, both by Freeman's calls and by the White House press release before any mention was made by the AEC to Con Edison of a surcharge. Con Edison naturally viewed the offer of power as having come from the White House and not from the AEC, as is evidenced by Luce's telegram of thanks to President Nixon during the week of July 27, 1970 (A2251-A2252, DX U-9); the AEC saw things in the same light, as evidenced by Quinn's statement to Sapirie on July 23 that the White House had taken the decision to release power out of the AEC's hands. (A292-A293; see also A1520, PX 4). In such circumstances, Con Edison naturally felt fully entitled to receive the White House-mandated power regardless of the AEC's attempt to obtain what turned out to be a huge and discriminatory surcharge. Moreover, of course, Con Edison knew that on July 24, 1970 Luce had emphasized to Quinn that Con Edison would not be discriminated against. (A36, Op 13; A819; A881) For these reasons, receipt of the power was in no respect in-

* And, of course, Con Edison was paying fully for the actual power purchased from the AEC's suppliers.

consistent with resistance to the AEC's huge, discriminatory surcharge, and cannot support an estoppel against Con Edison.

B. The Government Did Not Rely On Any Representation By Con Edison In Releasing the 200 MW

The District Court, in its Conclusions of Law, stated that Con Edison's "actions led to plaintiff's release of the 200 MW." (A57, Op 34) This conclusion is erroneous. The Government made the decision to release the 200 MW on July 23rd. The statements upon which the District Court based its finding of estoppel were not made until July 24th, and the District Court so found. (A57, Op 34) The White House commitment to release the power occurred prior to and independently of Con Edison's representations, not as a result of and in reliance upon them. The White House offered the power under its May 5 plan, not upon any representations of Con Edison.

To prove a case of estoppel, a plaintiff must show not only that the defendant made a representation, but also that the plaintiff's actions were induced by and were the proximate result of that representation. *C. F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir. 1974); *Atchison, T. & S.F. Ry. Co. v. W. B. Johnston Grain Co.*, 113 F. Supp. 396 (W. D. Okl. 1953). "No estoppel arises when the conduct assigned as a ground for estoppel was not relied upon or was not the cause of a change in position." *In re Spectrum Arena, Inc.*, 340 F. Supp. 767, 776 (E. D. Pa. 1971), *aff'd*, 462 F.2d 156 (3d Cir. 1972). When the conduct alleged to have given rise to an estoppel transpires *after* the plaintiff's change of position, the conduct cannot be the cause of the change of position. *Atchison T. & S. F. Ry. Co. v. W. B. Johnston Grain Co.*, *supra*. In other words, without a causal link between the defendant's representation and plaintiff's actions, there is no reliance by plaintiff, an essential element of an estoppel. See *Freedman v. The Concordia Star*,

250 F.2d 867 (2d Cir. 1958); *Helvering v. Schine Chain Theatres*, 121 F.2d 948 (2d Cir. 1941).

In this case, the evidence and even the factual findings of the District Court demonstrate conclusively that Con Edison's alleged representations were subsequent to and therefore immaterial to the Government's decision to release the 200 MW. The release would have been made in any event. Officials within the White House made it clear to the AEC on July 23rd "that the President had directed that the power be made available to Con Edison." (A31, A34, Op 8, 11) The White House publicly and unequivocally announced on July 23 that the AEC "will make available several hundred megawatts of power" to Con Edison. (A2064-A2065, DX R-3) (emphasis supplied) The AEC acknowledged—still on July 23rd—"that the decision to release the power had been taken from AEC's hands by the White House announcement." (A35, Op 12) Not until the next day, July 24, after the decision to release the power had already been made, did Luce and Quinn have the conversation during which the AEC for the first time mentioned anything about reimbursement for losses allegedly associated with the power reduction. There was no evidence even suggesting that the power release was directly or indirectly dependent upon Luce's alleged representations. The burden was on the government to prove the element of reliance, *Ross v. Commissioner*, 169 F.2d 483 (1st Cir. 1948), and since it failed to do so, the District Court's finding of an estoppel is clearly erroneous.

C. If The Government Did Rely On Representations By Con Edison, Such Reliance Was Unreasonable And May Not Give Rise To An Estoppel

Even if, as the District Court erroneously found, the Government relied on a representation by Con Edison that it would pay the AEC's costs, such reliance was unreasonable after August 6, 1970, and will not support an estoppel. *Twentieth Century-Fox Film Corp. v. National Publishers, Inc.*, 294 F. Supp. 10, 12 (S.D.N.Y. 1968). Con Edison main-

tained its position throughout August and September that it would pay only if the others paid. (A45, Op 22) Since this position was made abundantly clear to the AEC, the AEC by that time could not reasonably have relied upon any belief that Con Edison agreed unconditionally to pay the surcharge.

D. The Alleged Reliance Resulted in No Detriment To The AEC

A party asserting an estoppel has the burden of demonstrating that his reliance on another party's conduct worked to his detriment or prejudice. *Freedman v. The Concordia Star*, 250 F. 2d 867 (2d Cir. 1958); *Hill v. Johnson*, 35 App. Div. 407, 316 N.Y.S.2d 536 (2d Dep't 1970). As discussed in part IX of this Argument, *infra*, the AEC suffered no loss as a result of the release of the 200 MW. The Government cannot, therefore, base any recovery on a theory of estoppel.

II. Even If Con Edison Is Estopped From Asserting The Statute of Frauds, There Was No Valid Contract, Enforceable Or Unenforceable, Between The Parties, And The District Court Erred In Finding To The Contrary

In order to afford the Government relief on a theory of estoppel, the District Court had to find not only the requisite elements of an estoppel but also that there existed a valid contract against which Con Edison is estopped from asserting the Statute of Frauds. The District Court found "that the July 24, 1970 conversation between Quinn and Luce was sufficiently definite to constitute an agreement." (A54, Op 31). This conclusion is erroneous because (1) the White House had directed that the power be released unconditionally to Con Edison, and thus any later agreement to pay a surcharge would not constitute bargained-for consideration, (2) the July 24 telephone conversation was not intended by the parties as a final contract and at most constituted preliminary negotiations and (3) if the AEC did make an offer on July 24, Con Edison did not accept it.

A. Because The White House Had Directed That Power Be Released Unconditionally to Con Edison, the AEC Could Not Impose A Surcharge on The Power, And Any Promise By Con Edison Was Without Consideration

When the AEC released 200 MW of power for the use of Con Edison, it did so pursuant to the May 5 plan, which imposed no conditions precedent to the release of power upon either the recipient utilities or the ultimate recipient, the public.* After the May 5 plan was effected, the AEC was never in a position to impose any condition upon its release of power. Specifically, with respect to the 200 MW release, the decision to release the power to Con Edison had been taken out of the AEC's hands by the time Con Edison made its alleged promise to pay a surcharge. Such a promise was therefore unsupported by any consideration and cannot give rise to a contract.

On July 23, 1970, David Freeman in the White House called Con Edison and offered it the AEC power. (A801-A802) Later that day the White House issued a press release stating that the AEC "*will* make available several hundred megawatts of power to the Consolidated Edison Company serving New York City." (A2064-A2065, DX R-3) The AEC knew that the decision to release the power had

* Throughout the development of the May 5 plan, the AEC was aware that it would be called upon to reduce the power consumption at its gaseous diffusion plants. The AEC participated in formulation of the plan (A26, Op 3; A180, A184-A186), was given ample opportunity to suggest that it would incur costs and wanted to recover them, but failed to do so. (A26, Op 3; A186, A201-A204, A207-A209) It had recently (January 1970) experienced a similar power reduction for TVA and had specifically entered into a formal contract with TVA for payment of a power surcharge to eliminate the effects of that reduction upon added costs and lost production. Nevertheless, the May 5 plan provided simply that the "AEC will make arrangements to curtail production at the AEC gaseous diffusion plants." (A1984-A1995, DX Q-2) There was no mention of a surcharge. The Chairman of the AEC acknowledged, in a letter dated May 22, 1970, that the White House would "advise us of any emergency situations in which we are to execute the plan to release power to our suppliers." (A1520, PX 4)

been taken from its hands on July 23, and Quinn expressly acknowledged this on that date. (A292-A293)

Consequently, by the time Luce and Quinn spoke on July 24, the Government had decided to release the power to Con Edison regardless of whether Con Edison would pay for the AEC's incidental costs.* Whether the AEC would release any power was no longer a bargainable proposition for Quinn, and he was therefore unable to offer power as consideration for Luce's alleged promise to pay the AEC costs.

It is fundamental contract law that consideration must be bargained-for and must be the thing which the parties agree shall be given in exchange for, as here, an alleged promise. It must be regarded by the parties as consideration, and the mere fortuitous presence of circumstances which might constitute consideration for an agreement is insufficient. *Fire Insurance Association, Limited v. Wickham*, 141 U.S. 564, 579 (1891); *Colorado National Bank of Denver v. Bohm*, 286 F.2d 494, 496 (9th Cir. 1961); *United Fruit Co. v. United States*, 186 F.2d 890 (1st Cir. 1951); *McGovern v. City of New York*, 234 N.Y. 377, 138 N.E. 26 (1923) (Cardozo, J.); Restatement of Contracts § 75, and Comment b thereto (1932). See also *Hammond Oil Co. v. Standard Oil Co.*, 259 N.Y. 312, 181 N.E. 583 (1932); *Payne v. Connelly*, 32 App. Div.2d 693, 299 N.Y.S.2d 1013 (3d Dep't 1969).

As the United States Supreme Court stated in *Fire Insurance Association, Limited*, *supra*: "Nothing is consideration that is not regarded as such by the parties," and

"The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that con-

* Con Edison of course expected to pay for the 200 MW of power, since it was to be provided by the AEC's private suppliers, not by the Government.

tract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract." 141 U.S. at 579.

By July 24, the AEC's release of the 200 MW was merely past consideration, which is not consideration at all. *See General Bronze Corp. v. United States*, 338 F.2d 117 (Ct. Cl. 1964), where the Court quoted approvingly from Professor Williston:

"* * * Consideration, by its very nature, must be given in exchange for the promise, or at least in reliance upon the promise. Accordingly, something which has been given before the promise was made and, therefore, without reference to it, cannot, properly speaking, be legal consideration. * * *

* * * *

"* * * The time that past consideration is no consideration represents the overwhelming weight of authority and is almost universally followed. This has been the law since early times.' 1 Williston on Contracts Sec. 142 (3d ed. 1957)." 338 F.2d at 122.

In the present case, the Government had already announced the release of power before Luce made his statements to Quinn. As a result, Quinn simply had nothing to bargain with during the conversation since the release could no longer be viewed as consideration for Luce's later promise. Quinn's request can only be viewed as an attempt to obtain voluntary payment from Con Edison to help defray certain costs.

B. The July 24, 1970 Telephone Conversation Was Not Intended By The Parties As a Final Contract, Was In Any Event Too Indefinite To Constitute a Binding Contract, And Constituted, At Most, Preliminary Negotiations

Assuming *arguendo* that the AEC was in a position to bargain for payment of a surcharge on July 24, the telephone conversation on that date between Luce and Quinn,

even as found by the District Court, was too indefinite to constitute a valid contract. This indefiniteness, besides barring the formation of a contract, demonstrated the parties' lack of intent that the conversation was to be a binding contract. As indicated below, essential elements of a binding contract are absent. At the very most, the call may be construed as mere preliminary negotiations, but the evidence demonstrated that the parties did not contemplate even a future contract between them.

It is a fundamental principle of general contract law that preliminary negotiations do not constitute a binding contract. *Associated Tabulating Service, Inc. v. Olympic Life Insurance Co.*, 414 F.2d 1306, 1308 (5th Cir. 1969); *Merritt-Chapman and Scott Corporation v. Gunderson Bros. Engineering Corporation*, 305 F.2d 659 (9th Cir. 1962). Mere discussions do not constitute a contract if not so intended by the parties, as when the parties intend to enter into a binding contract in the future. *Associated Tabulating, supra*; *Insurance Company of North America v. United States*, 159 F.2d 699 (4th Cir. 1947). In any event, no contract is formed where the alleged agreement is so vague and indefinite, so defective in its terms that the essential elements of a contract (including price) are lacking. *Ginsberg Machine Co. v. J. & H. Label Processing Corp.*, 341 F.2d 825 (2d Cir. 1965); *Tradeways Incorporated v. Chrysler Corporation*, 342 F.2d 350 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965); *Plus Promotions, Inc., v. RCA Mfg. Co., Inc.*, 49 F. Supp. 116 (S.D.N.Y. 1943); *Willmott v. Giarraputo*, 5 N.Y.2d 250, 157 N.E.2d 282 (1959); *Ansorge v. Kane*, 244 N.Y. 395, 155 N.E. 683 (1927). Lack of specificity of terms, besides itself barring formation of a contract, is powerful evidence that the parties did not intend the then creation of a contract.

On July 24, Quinn called Luce not, as the District Court found, to "offer" the 200 MW to Con Edison (A36, Op 13), but, as Quinn himself twice testified, to "inform Luce that the Commission had determined that it would be able to

reduce its power consumption by an additional 200 megawatts" (A92, A307-A308) The offer of the power had been made on the previous day by the White House, and Con Edison had accepted, subject to confirmation that it could be transmitted to New York. Quinn was not offering power, but confirming to Luce that the reduction of 200 MW was technically feasible. By this time the release of power was a *fait accompli*. Quinn knew it, and his words reveal that he did not intend that this conversation with Luce would result in a contract for the release of power.

The District Court concluded that the July 24 conversation constituted a contract between the parties (A54, Op 31), yet found as a fact that "Luce stated that Con Edison was still studying their end of the transmission problem and that he was not yet in a position to request the power." (A36, Op 13) If Luce did not request any power during this conversation, it is difficult to conceive how he could at the same time have contractually bound Con Edison to pay a surcharge on the release of that power. Certainly Luce was not agreeing to pay a surcharge on power that he had not yet requested and was uncertain of ever receiving. The District Court's finding of fact only highlights the tentative, noncontractual nature of the July 24 conversation. It is submitted that Luce and Quinn were not bargaining at all; they were discussing arrangements for transmission to New York of the 200 MW that had already been promised to Con Edison by the White House. If this conversation had anything to do with an actual agreement on the recovery of costs, it was only as a negotiation preliminary to a contemplated agreement that never eventuated.

The District Court found that the July 24 conversation was sufficiently definite to constitute an agreement because the "parties are known," the "amount of power was fixed," and the parties "agreed that Con Edison would reimburse the AEC for its costs" as "determined by [the] AEC." (A54, Op 31) The District Court cited no legal authority for its legal conclusion nor any evidence in the record for

its statement that Con Edison agreed to reimburse the AEC for costs as determined by the AEC. Indeed, the Court's finding of fact that Luce reserved the point against discriminatory treatment regarding any surcharge on July 24 is inconsistent with that statement.

An examination of the relevant law reveals that failure of an alleged agreement to include a term as to price is a classic example of indefiniteness and vagueness and of essential terms omitted, such as to negate the very existence of a "contract" in the first place. See, e.g., *Tradeways Incorporated v. Chrysler Corporation*, 342 F.2d 350 (2d Cir.), cert. denied, 382 U.S. 832 (1965); *Ansorge v. Kane*, 244 N.Y. 395, 155 N.E. 683 (1927).

As the court stated in *Tradeways*:

"It is well settled that no contract can be formed if agreement has not been reached on an essential element, and price is certainly such an element." 342 F.2d at 353.

This is not a case where a readily ascertainable price (e.g., market value) can fill a missing price term in an otherwise complete contract. Only the AEC operated gaseous diffusion plants in the United States, and there was no market value for a power reduction at these plants. The present situation is thus not susceptible of a market value analysis. Even if it were, however, that would not aid the plaintiff here, since market value cannot be premised solely upon the incident in dispute. The law is clear that the Government may not use the release of the 200 MW to establish a market price.

In the leading case of *Orester v. Dayton Rubber Mfg. Co.*, 228 N.Y. 134, 126 N.E. 510 (1920) (Andrews, J.), the defendant had refused to deliver a quantity of tires to the plaintiff in Syracuse as required by a contract between them. The Court of Appeals reversed the trial court's ruling that the market value of the tires in Syracuse was created solely by the plaintiff's purchase from the defendant there. In accordance with the *Orester* principle, the Government here

may not show a market price based on its release to Con Edison. And since there was no other evidence concerning the value of the reduction, the Government cannot demonstrate such a value.

It is also insufficient to meet the requirement of a price term that, as the District Court found, the parties "understood that the costs would be determined by AEC." (A54, Op 31) First, it is entirely unreasonable for a court—particularly one granting equitable relief—to base a recovery on such an inherently inequitable kind of agreement. Where the price to be charged is left completely within the discretion of one party, the other party may well be required to pay an amount far in excess of the reasonable value of the first party's performance. Courts have always been unwilling to enforce an agreement permitting one party to dictate its terms. See *Lipman v. Arlington Seating Co.*, 192 F.2d 93 (7th Cir. 1951); *Davis v. General Foods Corp.*, 21 F.Supp. 445 (S.D.N.Y. 1937); 1 S. Williston, *Contracts* 140 (3d ed. 1970); Restatement of Contracts § 32, Comment a (1932). Second, the District Court's finding that Luce agreed to pay any costs the AEC might assess is completely at odds with the finding that Luce agreed to pay only what other recipients had paid—a statement by which Luce specifically sought to avoid subjecting Con Edison to the whims of the AEC. (A881)

Furthermore, as was demonstrated convincingly during the post-release discussions between the AEC and Con Edison, throughout discovery, and during the trial of this action, there are many different ways of calculating the "losses" alleged here. There are different vantage points from which to view the situation and which drastically alter the magnitude of any alleged losses. The evidence on damages spoke variously in terms of "loss of production," "efficiency losses," "mixing losses," "blending losses," and other concepts which have various interpretations and which fail to satisfy the requirements of definiteness de-

signed to avoid chaos in contract law.* The telephone call between Luce and Quinn established no clear "formula" or other basis from which to calculate damages and the terms used by the parties, such as efficiency losses (A870), were never discussed or defined.

The July 24 telephone conversation is also insufficient in that it lacked a term as to the duration of the release. Quinn testified that he did not know how long Con Edison would need the power, nor did he state how long the AEC would be able to provide it. (A341) Where the duration of a performance is not definite, there can be no contract. *Greer v. Stanolind Oil & Gas Co.*, 200 F.2d 920 (10th Cir. 1952).

Taken together, the lack of a price term, the lack of a duration term, and the general character of the July 24 conversation make it clear that the parties did not intend a contract to arise therefrom and, irrespective of their intent, no contract did arise therefrom.

C. Con Edison's Response To The Alleged AEC Offer in the July 24, 1970 Conversation Was Not Acceptance of an Offer But, At Most, Was a Counter-Offer

The District Court found that during the July 24 conversation Luce asserted that he was willing to pay a surcharge to the AEC on the same basis as other recipients under the May 5 plan. (A36, Op 13) If Quinn was in fact making an offer of power, Luce's response could not have been an acceptance because he stated a material condition of acceptance that had not been contained in Quinn's offer. When an offer is accepted subject to a material condition, neither party is bound to an agreement until the condition has been withdrawn or satisfied. *Orient Mid-East Great Lakes Service v. International Export Lines*, 315 F.2d 519 (4th Cir. 1963). Even if a reply to an offer purports to accept it,

* E.g., "additional costs" (A93); "cost and losses" (A309); "losses of efficiency" (A870); "some costs" and "blending losses" (A2389); "mixing losses" (A580); "blending loss" (A348); "power cost", "fixed operating cost", and "added factor cost" (A601).

if the reply adds qualifications or requires the performance of a new condition, it is not an acceptance but a counter-offer. *Banking & Trading Corp. v. Reconstruction Finance Corp.*, 147 F.Supp. 193 (S.D.N.Y. 1956), *aff'd*, 257 F.2d 765 (2d Cir. 1958). Luce's condition was never withdrawn and never satisfied, and his words on July 24 therefore constituted a counter-offer, not an acceptance. Without an acceptance, there of course can be no contract.

III. Even If a Valid, Enforceable Contract Arose Between The Parties, Con Edison Did Not Thereby Agree, As The District Court Found, Unconditionally To Pay The AEC's Costs

Assuming that a valid contract arose between the Government and Con Edison, and further assuming that Con Edison is estopped from asserting the Statute of Frauds against the enforcement of that contract, the terms of that contract do not obligate Con Edison to pay any surcharge, much less the one assessed by the AEC.

The District Court stated in its Conclusions of Law that during the July 24 conversation Luce agreed with Quinn that Con Edison would "reimburse the AEC for its costs" and "understood that the costs would be determined by AEC." (A54, Op 31) This conclusion conflicts not only with the evidence but also with the District Court's own finding of fact.

The District Court found that during the July 24 conversation, Quinn informed Luce that "the AEC would look to Con Edison for reimbursement of its additional costs." (A36, Op 13) Luce responded "that Con Edison would be willing to pay whatever surcharge had been paid by the recipients of the previous 450 MW reduction." *Id.* If there were any promise to pay the AEC's costs, therefore, it was only a conditional one: to pay on an equal basis with other recipients under the May 5 Plan. Since the other recipients never paid a surcharge (and were never asked to pay one until Con Edison's protests forced the AEC

to make a futile, *pro forma* request), the condition insisted upon by Luce precludes recovery on the alleged contract.

It is *not* the case that Con Edison fortuitously imposed a condition that later, to the surprise of the AEC, turned out to preclude any recovery of costs. On July 24 Quinn knew very well that the previous recipients had paid nothing (A36-A37, Op 13-14), and consequently, when Luce stated his "equal treatment" condition, Quinn, although he remained silent, must have realized its obvious effect: Con Edison was agreeing to pay no AEC costs at all unless somehow the earlier recipients of power could be persuaded to pay a surcharge.

Moreover, Luce did not impose the condition as a mere whim. Quinn was asking him to pay a surcharge, the ultimate magnitude of which was unknown even to Quinn. (A93) Quinn could not even offer an estimate of the possible costs. Luce's reply not only showed his concern for equal treatment under the May 5 Plan but it also prevented the price term of an agreement from being dictated by the other party. Knowing that the operators of the utilities that had already received power under the program would not have agreed to pay an unreasonable charge, he agreed to pay on the same basis that those utilities had. (A881)

In view of these facts, it becomes clear that Con Edison has not breached the alleged contract. No other recipients of power under the May 5 Plan paid a surcharge, and having at most agreed to pay only what the others paid, Con Edison is obligated to pay nothing.

IV. Plaintiff Is Not Entitled to Recover Any Damages On A Theory Of Quasi-Contract

The District Court found that Con Edison is also liable to the Government on a theory of quasi-contract or restitution for the costs incurred by the AEC in releasing power to Con Edison. (A59-A61, A67-A68, Op 36-38, 44-45) This conclusion is not supported by the evidence and reflects a basic misapprehension of the objectives and principles of the quasi-contractual remedy. Con Edison submits that

a recovery in quasi-contract is improper in this case because (1) it was not unjustly enriched by the receipt of the 200 MW; (2) the Government may recover in restitution only the amount by which Con Edison was unjustly enriched, not an amount reflecting costs incurred by the Government in conferring an alleged benefit; and (3) the AEC continued to supply the power despite Con Edison's firm denial of any obligation to pay a discriminatory surcharge and despite AEC's right, at any time, to terminate the reduction.

A. Con Edison Was Not Unjustly Enriched By The Receipt of the 200 MW

In order to recover in quasi-contract, the Government must show that Con Edison was unjustly enriched by reason of the Government's actions. *Bloomgarden v. Coyer*, 479 F.2d 201 (D.C. Cir. 1973). The District Court, after rejecting Con Edison's uncontradicted proof that it had not profited by receipt of the 200 MW, found the requisite unjust enrichment because the power had a "beneficial impact" on Con Edison's goodwill and on the value of its securities. (A60, Op 37) This conclusion ignored the clear weight of the evidence and the applicable law.

Bertram Schwartz, Con Edison's Senior Vice-President, gave uncontradicted testimony that the additional revenues realized by reason of the sale of the 200 MW did not offset the cost paid for the power. (A980-A989, A1081) Con Edison paid 7.85 mills per kilowatt hour for the 200 MW (which included the price of the raw power and the cost of transmission), but during the period of receipt Con Edison's average cost of fuel was only 5.9 to 6.5 mills per kilowatt hour. Since Con Edison is essentially permitted to recover from consumers only the average cost of fuel, it failed to recover approximately \$631,000 out of the amount paid for the 200 MW. (A978-A980) Con Edison also realized \$595,000 in additional revenues from the sale of the extra 200 MW. Offsetting the additional revenues against the unrecovered

costs leaves a loss of \$36,000. (A982-A983) Without citing contrary evidence and without any elaboration, the District Court rejected Mr. Schwartz's testimony "as constituting a remarkably narrow view of the events which transpired in the summer of 1970." (A60, Op 37)

In addition to ignoring the only evidence directly offered on the enrichment issue, the District Court based its finding of enrichment upon general statements by Luce "that the 200 MW had a beneficial impact upon Con Edison's goodwill and upon the value of its securities." (A60, Op 37).^{*} Such an indefinite benefit, based only on speculation, does not constitute the unjust enrichment traditionally associated with a recovery in quasi-contract. Con Edison paid the fair market value of the 200 MW to the suppliers; the power itself, therefore, cannot constitute an enrichment, and certainly not an unjust one. Other than the power, Con Edison received no property and no other asset, tangible or intangible, upon which a finding of enrichment could be based. If a defendant has received no benefit, a plaintiff may not have restitution, even if the plaintiff has suffered a loss. *General Metals, Inc., v. Green Fuel Economizer Co.*, 213 F. Supp. 641 (D. Md. 1963); *Tramonte v. A. J. Rasmussen*, 167 S.W.2d 566 (Tex. Ct. Civ. App. 1942). The vague and incidental benefit found by the District Court is far too remote, if it is not entirely illusory, to warrant a recovery in quasi-contract. A benefit must be tangible in order for a plaintiff to recover in restitution. In *United*

^{*} Luce's actual words were even less definitive than the District Court's paraphrase of them:

"A I would not say the shareholders benefited. But I would say that the customers did. And indirectly the shareholders benefited because of course we are held responsible for supplying energy to New York City. And if we fail, for whatever reason, this in the long run works against the interest of the company and its stockholders. So certainly indirectly the stockholders also benefited.

"Q In other words, it affects good will, the ability of Con Edison to—

"A It certainly does, counsel, yes." (A853)

States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), where the plaintiff sought recovery on an alternative theory of *quantum valebat*,* the court stated that "such a remedy is appropriate only where one party to a transaction has received and retained *tangible* benefits from the other party." 364 U.S. at 566 n.22. (emphasis supplied) See also *Schillinger v. United States*, 155 U.S. 163 (1894); *Rotea v. Izuel*, 95 P.2d 927, 14 Cal. 2d 605 (1939).

In *UMW v. District 50, UMW*, 435 F.2d 421 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), where the plaintiff sought recovery in quasi-contract of amounts loaned on defendant's unenforceable promissory note, the court denied relief because it was impossible to determine the extent to which these loans had benefited the defendant. The court rejected an alleged benefit arising from an increase in the defendant's membership because it was impossible to tell that the expansion would not have taken place absent the loans and because the expansion served the plaintiff's purposes as much as the defendant's.

The principles of these cases make it clear that even if the District Court correctly ignored Con Edison's proof of a negative benefit, the finding of an amorphous benefit to Con Edison's shareholders and "good will" cannot support a restitutionary award. There was no evidence whatsoever concerning the price of Con Edison's shares, and even if there had been, it would have been impossible to establish the extent, if any, to which their price was affected by receipt of the 200 MW. Moreover, any "beneficial impact" on Con Edison's good will hardly appears more tangible than the benefit to the Government resulting from the publicity that it had rescued the people of New York City in an emergency situation.** "Restitution means

* *Quantum valebat*, like *quantum meruit*, is one of the common counts in assumpsit from which modern restitution theory is derived. See 3 W. Blackstone, Commentaries *161.

** In fact, the AEC, its Oak Ridge office, and the White House, appearing quite anxious to make known their respective roles in providing the assistance, each released a press statement concerning the power reduction. (A2064-A2065, DX R-3; A2070-A2071, DX W-3; A2324-A2325, DX F-8)

that the defendant must give something back to the plaintiff," 2 Restatement of Contracts § 348, Comment a (1932), and Con Edison in this case simply received nothing from the Government that it could have returned, specifically or in a readily determinable amount of money.

Moreover, any intangible benefits arising from the Government's actions accrued to the citizens of the New York City area. They were the ultimate recipients of the power, as intended by the May 5 Plan. The purpose of the Government's May 5 Plan was to assist the public, not Con Edison, and the Government cannot recover from Con Edison for a benefit bestowed upon third parties. *See Rotea v. Izuel, supra.*

B. The Government May Not Seek Restitution Of Any Costs Allegedly Associated With Its Release of Power to Con Edison

After finding that Con Edison was unjustly enriched as a result of the AEC's power reduction, the District Court, instead of determining the amount of the enrichment and awarding damages based thereon, resorted to plaintiff's claimed "actual" costs in reducing its power consumption. (A67-A68, Op 44-45) The District Court ruled that because the benefit to Con Edison "is not capable of exact valuation," the recovery in restitution is measured "by reference to the value of the services rendered, or by measurement of the plaintiff's costs incurred." (A67, Op 44) The Court proceeded to measure recovery in restitution by referring to Con Edison's "promise to pay the AEC's costs." (A68, Op 45) This analysis is legally without basis and not supported by the facts even as found by the District Court.

First, there is no rule that recovery in restitution is measured by plaintiff's costs where defendant's enrichment is incapable of exact valuation. Con Edison submits that the proper measure of recovery in restitution is the benefit received by the defendant, not the cost incurred by the plaintiff.

Courts and commentators have recognized from an early date that the object of restitution is to prevent the unjust enrichment of the defendant and that any recovery must be based on the amount of that enrichment. Professor Corbin defined a quasi-contract as

"a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched." Corbin, *Quasi-Contractual Obligations*, 21 Yale L.J. 533, 550 (1912) (emphasis in original)

As more recent writers have stated it,

"The main substantive law basis [of restitution] and the remedial goal is implicit in the phrase "prevention of unjust enrichment." As to this there is no argument in American law. . . . The substantive law of contract rights and liabilities is a matter of indifference. It is the enrichment of the defendant—a much different matter—which supplies the substance." K. York & J. Bauman, *Cases and Materials On Remedies* 26 (1967) (emphasis supplied).

Professor Williston emphatically holds, in the title of the pertinent section of his treatise, that "Benefit to the Defendant Is the Proper Measure of Restitution." 12 Williston, *Contracts* 292 (3d ed. 1970) (Section 1482). He goes on to adopt the rationale of the leading quasi-contract case, *Gillis v. Cobe*, 177 Mass. 584, 59 N.E. 455 (1901), where the court noted that the plaintiff's

"sole claim to be paid anything is that if he is not paid, the defendant will profit at his expense. Until he has proved that the defendant will in that case profit at his expense, he has not made out a prima facie case to be paid anything, and until he has proved how much that profit will be, his prima facie case is not complete." Williston, *supra*, at 297-98.

To permit a measure other than the benefit to defendant, states Williston, would "in reality allow the plaintiff to recover on the contract," not on *quantum meruit*. *Id.* at 292-93. The District Court here has allowed precisely that, in effect awarding the Government the value of the alleged contract of July 24 as the Court found it—a surcharge, consisting of various direct and indirect costs incurred by the AEC as a result of the power reduction. Plaintiff received a measure of damages sometimes proper in a contract action, but not in restitution.

Williston's position is in accord with the great weight of authority in the United States that the proper measure of recovery in restitution is the benefit received by the defendant. The "benefit to defendant" measure was applied in *Hill v. Waxberg*, 237 F.2d 936 (9th Cir. 1956), where the court stated that

"[i]n the absence of fraud or other tortious conduct on the part of the person enriched, restitution is properly limited to the value of the benefit which was acquired." 237 F.2d at 939.

The court then elaborated:

"[T]he party benefited should not be required to reimburse the other party on the basis of such party's losses and expenditures, but rather on a basis limited to the benefits, which the benefited party has actually acquired." *Id.*

Similarly, *In re Irving-Austin Building Corp.*, 100 F.2d 574 (7th Cir. 1939), the court stated that the amount of restitution "is measured, not by the amount of time and energy expended by the laboring party, but by the value of such services to the beneficiary." 100 F.2d at 578. See also *Dunn v. Phoenix Village, Inc.*, 213 F. Supp. 936, 952 (W.D. Ark. 1963) ("The basis of liability under a quasi or

constructive contract is the benefit conferred upon a defendant, and not the detriment incurred by the plaintiff.")

In *UMW v. District 50, UMW*, 435 F.2d 421 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), the court emphatically stated this rule:

"Even when a person seeking restitution has not been guilty of tortious conduct he cannot recover for services rendered or property transferred to a nontortious recipient on the basis of cost or loss incurred, but only on the basis of value to the recipient." 435 F.2d at 433.

In *Robbins v. Frank Cooper Associates*, 19 App. Div. 2d 242, 241 N.Y.S. 2d 259, (1st Dept. 1963), *rev'd on other grounds*, 14 N.Y. 2d 913, 200 N.E. 2d 860 (1964), the court stated, "If recovery is based on quasi-contract, the damage is defendants' unjust enrichment—what they actually profited from the use of the material." 19 App. Div. 2d at 244.

The District Court, in disregard of this overwhelming authority, cited two cases to support its position that the Government should recover its costs because the benefit to Con Edison was uncertain. In the first case, *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d. 830 (2d Cir.), *cert. denied*, 98 S.Ct. 183 (1977), where one oceangoing vessel with a doctor on board had changed its course to pick up a seriously ill seaman from another ship that had no doctor, this Court permitted the owner of the first vessel to recover its fuel and other expenses in performing the rescue, regardless of the value of the benefit actually conferred. For several reasons, this case does not stand for the proposition stated by the District Court and if it did, it would not be applicable in the premises.

A reading of the *Peninsular* opinion reveals that this Court was prepared to award the plaintiff's costs "regard-

less of the value of the benefit conferred," 553 F.2d at 836, and that the reasonable value of those costs would be determined by the reasonable expense incurred where no market value is available. This is different from the principle for which the District Court cited the case, *i.e.*, damages are measured by plaintiff's costs whenever the benefit to the defendant is incapable of exact valuation.

Assuming that *Peninsular* did stand for the District Court's enunciated principle, that case is distinguishable in several major ways from this case. First, the plaintiff in *Peninsular* had invoked this Court's admiralty jurisdiction, and as this Court observed concerning the events giving rise to the claim, "It is difficult to conceive of a transaction more maritime in nature than the one presented here." 553 F.2d at 830. Accordingly, when this Court enunciated a rule permitting recovery of plaintiff's costs, it was *expressly* limited to the owners of vessels that request medical aid for their crewmen from other vessels. *Id.* at 836. Such a maritime rule should not have been applied where, as here, the District Court had no maritime jurisdiction. *See McNeil v. A/S Havbor*, 339 F. Supp. 1264 (E.D. Pa. 1972).

Second, this Court justified a "cost-to-plaintiff" recovery on the sole ground that a vessel carrying a stricken seaman is "in a far better position [than the rescuing vessel] to evaluate the relevant costs and benefits of seeking various forms of aid . . ." 553 F.2d at 836. However sensible a cost-to-plaintiff recovery may be where a ship's captain is readily able to estimate, from his own experience and knowledge, the amount of fuel another vessel will use in making a rescue, such a rule is not justified in a quasi-contract setting where, as here, neither the grantor nor the recipients knew of the costs involved at the time the "benefit" was conferred. Con Edison was in a state of ignorance as to the costs involved in a power reduction by the AEC. The utility was not in the business of enriching uranium, and none of the officers who were involved was familiar with the costs of separative work or the effect of

a lower power level upon the AEC's costs of production.* Moreover, on July 24 Quinn at the AEC was unaware of the amount of the surcharge and could not quote to Luce so much as a broad range of the potential costs. (A309, A863). In fact, no one at the AEC calculated the amount of the surcharge until after the 200 MW reduction had been effected. (A2072-A2073, DX X-3; A333) It was in the face of this uncertainty that Luce conditioned Con Edison's payment upon equal treatment with previous recipients, knowing that the experienced operators of those utilities would not have paid "some outlandish price" for the power. (A881)

Where the captain in *Peninsular* could place a value on fuel and other expenses that would directly result from a rescue, Luce could not evaluate the direct cost involved in connection with the reduction and certainly could never have anticipated that the AEC would eventually seek to recover costs so diverse and so remotely connected with a release of electricity as maintenance of the AEC's gaseous diffusion equipment and service roads, transportation of uranium between the AEC's plants, planning, research and development, security investigations of prospective AEC personnel, AEC payments in lieu of taxes to communities near its plants, security guard service for buildings not involved in the diffusion process, and storage of uranium. (A1590-A1602, PX 41; A633-A637, A687-A696)** Under such circumstances, when the recipient of the benefit was not in a position to evaluate the costs of the assistance, the

* In fact, all Con Edison officers had thought that the surcharge would amount to 10% to 20% of the production costs of the power, as told to Hauspurg by Nagel (A823, A896-A897, A904, A955-A956).

** These elements of the claimed surcharge suggest not only that Con Edison utterly lacked knowledge of the character possessed by a ship's captain concerning the cost of assistance, but also that the AEC is attempting to recover costs that do not reflect the reasonable value of its services. The *Peninsular* rule, even if it were otherwise applicable here, permits recovery only of the reasonable value. 553 F.2d at 836. The unreasonableness of the AEC's calculation of the surcharge is discussed in detail in Point IX of this Argument, *infra*.

rule in *Peninsular* should not be applied. Certainly the rule in *Peninsular* cannot be regarded as one generally applicable in quasi-contract. Cost-to-the-plaintiff as a general rule would produce many anomalous recoveries, as for example where the plaintiff's costs are wholly out of line with the benefit conferred—which is indeed the present case.

Third, the *Peninsular* rule is designed to encourage seamen to perform their "moral obligation" to save imperiled lives of other seamen. 553 F.2d at 836. In this case, although Con Edison undoubtedly faced an emergency in the sense that its reserve capacity had been almost eliminated, there existed no threat of a complete shutdown of power and certainly no direct threat to human life. (A991-A994) The District Court found that even if Con Edison had not received the 200 MW from the AEC, the worst possible consequence would have been a few temporary interruptions of service in limited areas. (A40, Op 17; A991-A992) It is also questionable whether the Government acted in fulfillment of a moral obligation akin to that which arises between voyagers on the high seas.

Fourth, the defendant's vessel in *Peninsular* had requested the assistance from the plaintiff's vessel, and the matter of reimbursement was apparently discussed from the beginning. 533 F.2d at 833. Con Edison did not request the power from the Government initially in this case; rather, the White House made the offer of power pursuant to its emergency power assistance plan—without any mention of a surcharge—and decided to release the power on the day before Quinn raised the subject of a surcharge with Luce. See discussion at 13-18, *supra*. The Government's assistance here was thus formally offered without any expression of intent that it was not gratuitous. Such an intent is a prerequisite to recovery even under the maritime circumstances of *Peninsular*. See 553 F.2d at 834-35. Furthermore, in *Peninsular* the captain of the ship carrying the stricken crewmen did not in any way indicate that compensation would be refused—unlike the present case

where Luce specifically insisted upon equal treatment with the recipients of the 450 MW.

Fifth, the *Peninsular* court recognized that the cost-to-plaintiff rule would apply only where there are no means of determining the market value of plaintiff's services. *Id.* at 836. Here Con Edison established that when utilities and power pools throughout the United States provide electricity to each other in emergencies, they charge only the cost of the power plus ten percent. (A2288-A2315, DX B-8; A890, A936, A941) If any market value exists, therefore, it is this "cost plus ten percent", and Con Edison has already paid the cost of the power itself to the suppliers.

The second case relied on by the District Court was *Campbell v. Tennessee Valley Authority*, 421 F.2d 293 (5th Cir. 1969). (A68, Op 45) The conclusion in *Campbell*, however, has been criticized not only in a strong dissent by a member of that court but in legal commentary. The plaintiff in *Campbell* had microfilmed certain trade journals for TVA and, after having his express contract claim dismissed, brought suit "on *quantum meruit* or a contract implied in law." 421 F.2d at 294. The court, in determining whether the proper measure of recovery was the cost of the services to the plaintiff or the benefit to TVA, found conflict among the cases but concluded that the plaintiff should recover his costs. 421 F.2d at 296. In his dissent, Judge Rives discussed considerably more precedent than his brethren and convincingly reached the opposite conclusion. 421 F.2d at 301-305. In their analysis of the cases, the *Campbell* majority was misled by the term *quantum meruit* and failed to distinguish between those cases involving contracts implied-in-law (i.e., quasi-contracts) and those involving contracts implied-in-fact. The "cost-to-plaintiff" rule decided upon by the majority was actually based on authority which expressly states that the rule should *not* be used in quasi-contract cases. See Note, 1970 Duke L.J. 573, 579-82 (1970).

In view of the foregoing, there appears to be no support for the District Court's conclusion that an inexact valuation of Con Edison's enrichment permits the Government to recover its costs. The proper course where there is no precise proof of unjust enrichment is to deny recovery. See *UMW v. District 50, UMW, supra*. But even if the rule stated by the District Court existed, its invocation would be improper here since, as discussed in the preceding subsection of this argument, Con Edison's benefit (or, as it turned out, negative benefit) was capable of sufficient valuation.

The District Court, once it had determined that the Government's costs were the appropriate measure of recovery, valued these costs by reference to Con Edison's alleged promise to pay them. Assuming *arguendo* that the Government's costs are recoverable in restitution, they may not be measured by an alleged promise by Con Edison. First, as discussed *supra*, Con Edison did not make a promise to pay anything, and no contract, enforceable or unenforceable, ever existed between the parties. Second, if Con Edison promised to pay anything, it was, as the District Court itself found, "to pay whatever surcharge had been paid by the recipients of the previous 450 MW reduction." (A36, Op 13) Since the previous recipients paid no surcharge, the Government's recovery under the District Court's "defendant's promise" measure would be nothing.

C. The Government May Not Recover In Quasi-Contract Because The AEC Rendered Performance With Knowledge That Con Edison Had Denied The Alleged Contract

As early as August 6, 1970, and certainly no later than August 10, 1970, Con Edison notified the AEC that it would not pay the surcharge if the other recipients of power under the May 5 program did not pay one. (A904-A906, A1006-A1007; A35, Op 35; A2080-A2081, DX H-4) In spite of this position by Con Edison, which was reiterated throughout the period in which Con Edison received the

power, the AEC continued to supply the 200MW until October 1, 1970. (A46, Op 23) Assuming *arguendo* that a contract existed between the parties, Con Edison's actions amounted to a repudiation of that contract, and restitution will not be awarded to one who has continued to perform with knowledge of such a repudiation. 2 Restatement of Contracts § 352 (1932); *Clarke v. Marsiglia*, 1 Denio 317 (N.Y. 1845); *Fulton v. Canno*, 222 N.Y. 189, 18 N.E. 633 (1918). The District Court concluded, however, that Con Edison "cannot assert that it has repudiated the contract while continuing to accept its benefits" and added that Con Edison in any event never clearly repudiated the agreement. (A53-A54, Op 36-37) It is submitted that the District Court erred as to both points.

First, Con Edison's acts did in fact constitute repudiation of any alleged contract. Assuming that Con Edison somehow had unconditionally agreed to pay the AEC's costs, it notified the AEC—certainly by August 10—that it would not pay those costs if the previous recipients of power had not paid them. Since the AEC had not collected any surcharge from the earlier recipients and knew it was unlikely to collect such a surcharge, Con Edison's "equal treatment" statements constituted an effective repudiation of the agreement as the AEC claims to have understood it. A formal, explicit refusal to perform is not necessary to constitute a repudiation; it is sufficient that a party's actions demonstrate an intention to refuse performance in the future. See *Tobriner v. Mayfair Extension, Inc.*, 250 F. Supp. 614 (D.D.C. 1966), *aff'd sub nom. Luxemburg v. Mayfair Extension, Inc.*, 382 F.2d 475 (D.C. Cir. 1967). When a party persistently demands an additional condition precedent to its required performance under a contract, there is a repudiation. *Pacific Coast Eng'r Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889 (9th Cir. 1969). Certainly, Con Edison's repeated assertions that equal treatment was a condition precedent to its payment of a surcharge was a clear expression that it denied liability unless the con-

dition was met and constituted repudiation within the sense of the principles stated above.

Second, Con Edison's continued receipt of the 200 MW does not preclude it from asserting the repudiation of the contract as a defense to recovery in restitution. *Tibbetts Construction Corp. v. O & E Construction Co.*, 15 N.Y.2d 324, 206 N.E.2d 340 (1965), cited by the District Court, contains dictum that repudiation of a contract is nullified by a "subsequent acceptance of benefits growing out of the contract," 15 N.Y.2d at 338, since such acceptance is inconsistent with repudiation. 15 N.Y.2d at 334. But that principle is not applicable here, since the receipt of the 200 MW was not inconsistent with Con Edison's denial of the alleged contract and did not arise out of the alleged contract. To the contrary, Con Edison accepted the 200 MW as the result of the White House's unconditional July 23, 1970 offer of assistance and was only rejecting the AEC's attempt to exact a discriminatory surcharge, which in no manner affected Con Edison's right to keep receiving the 200 MW to assist New York City.

Further, the principle alluded to in *Tibbetts* appears directed at instances where, absent a clear repudiation by defendant, a plaintiff is required to continue performance. Here there was a clear repudiation by Con Edison, and the AEC possessed the right to end the reduction at any time and for any or no reason. (A1546-A1547, PX 15; A1548-A1549, PX 16; A1550-A1551, PX 17) Plaintiff was thus not duty-bound to continue performance or risk allegations of breach, but instead could at any time have ended the reduction and avoided further losses.

V. Con Edison Cannot Be Held Liable For The Surcharge On A Theory That The Government Fulfilled Con Edison's Duty To Provide Power To The New York City Area

The District Court found that Con Edison is liable to the Government for the surcharge because "the AEC ful-

filled Con Edison's duty to provide the New York area with electricity under emergency conditions and with the clear intent that it be reimbursed." (A61, Op 38) The District Court stated that this theory, which was never separately alleged in the Complaint and was mentioned for the first time in plaintiff's trial brief, sounds in quasi-contract and is within the scope of Count Four. (A75, Op 52 n. 13) Con Edison urges that regardless of its nature, the theory is inapplicable in this case.

A. Con Edison Does Not Have An Absolute Duty To Supply Electricity To Its Customers

The District Court found that Con Edison had an unqualified duty to supply electricity to the New York City area, based solely on the testimony of Charles Luce and Bertram Schwartz to the effect that Con Edison "is held responsible for providing electricity to New York" and "was under a duty to make best efforts to provide power." (A63, Op 40) In so characterizing Con Edison's duty, the District Court erroneously relied upon the legal conclusions of witnesses and ignored the applicable law, which provides that Con Edison has only a limited duty to provide its customers with electricity.*

The statements of a witness as to legal rights or duties he thinks he has are immaterial in determining the nature of a legal duty. *Kaiser Industries v. United States*, 340 F.2d 322 (Ct. Cl. 1965); *Helms v. Sinclair Refining Co.*, 170 F.2d 289 (5th Cir. 1948). Whether a duty arises from a particular relationship is a question of law for the court. *McClelland v. Baltimore & O.C.T. R.R. Co.*, 123 F.2d 734 (7th Cir. 1941). A witness is not competent to make legal

* Even in considering the statements of witnesses on the issue of Con Edison's legal duty, the District Court ignored the redirect testimony by Con Edison's Bertram Schwartz that "We normally do not have contracts with our customers and, in fact, on most occasions when our customers suffer an outage, we are not responsible for any losses that the customer might incur as a result." (A1133)

conclusions. *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505 (2d Cir. 1977). The District Court, therefore, wrongly based its conclusion that Con Edison had a legal duty to supply electricity upon the opinion testimony of two witnesses. The proper focus is upon the law of New York.

Under the statutory law of New York, Con Edison is required under most circumstances to supply electricity to the owner or occupant of any building who applies for it, N.Y. Transp. Corp. Law § 12 (McKinney 1976-77 Pkt. Pt.), and then to "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." N.Y. Pub. Serv. Law § 65 (McKinney 1955). These duties are not absolute, however.

Specifically, an electric company is not liable for damages arising from an intentional or accidental cutoff of power unless it resulted from the company's gross negligence and not from events beyond the company's control. *Monolith Portland Midwest Co. v. Western Public Service Co.*, 142 F.2d 857 (10th Cir. 1944). See *Curry v. Norwood Electric Light & Power Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence Cty. Ct. 1925). Furthermore, in July 1970, the New York State Public Service Commission had approved, as part of Con Edison's rate schedule, an exemption for ordinary negligence in the valid exercise of Con Edison's powers and also for interruption of services from causes beyond Con Edison's control. The exemption provides:

"13. Liability

"(a) Continuity of Supply: The Company will endeavor at all times to provide a regular and uninterrupted supply of service, but in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants or agents, the Company will not be liable therefor.

“The Company may, without liability therefor, interrupt service to any Customer or Customers in the event of emergency threatening the integrity of its system if, in its sole judgment, such action will prevent or alleviate the emergency condition.” Public Service Commission Schedule of Electricity Service No. 6, Third Revised Leaf No. 18 (Dec. 23, 1968).

New York courts have declared this provision to be lawful since it does not absolve the utility from gross negligence. *Devers v. Long Island Lighting Co.*, 79 Misc.2d 165, 359 N.Y.S. 2d 940 (App. Term, 9th, 10th Dists. 1974); *Newman v. Consolidated Edison Co., Inc.*, 79 Misc.2d 153, 360 N.Y.S. 2d 141 (App. Term, 2d, 11th Dists. 1973). Con Edison's duty, therefore, was not the seemingly absolute duty found by the District Court. Con Edison was obligated only to avoid gross negligence in maintaining a continuous supply of power to its customers.

The Government presented no evidence to suggest, and the Court made no finding, that Con Edison failed or would have failed in the absence of the Government's assistance to fulfill this duty. Without such evidence, there could be no finding that the Government fulfilled Con Edison's duty. One party must fail in its duty before another can claim to have fulfilled it. In the cases and Restatement section cited by the District Court to support its formulation of the “emergency assistance” doctrine, the parties bound by a duty had clearly failed to fulfill it.* Since there

* In *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), where the court found that the two defendant barge owners had violated a statutory duty to remove sunken barges, one owner had notified the Government that it was abandoning the barges and the other had directly refused to remove the barge. The ship's captain in *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, *supra*, similarly admitted that his vessel was ill equipped to deal with the medical emergency that arose there.

Section 115 of the Restatement of Restitution also makes it clear that a breach of duty must occur before another may fulfill the

is no evidence that Con Edison was unable or unwilling to carry out its duty to supply electricity as defined by the law of New York, the Government is precluded from contending that its release of 200 MW constituted fulfillment of that duty.

Con Edison's acknowledgement that it needed power after the Ravenswood breakdown did not constitute an admission that it could not fulfill its duty. Con Edison was not admitting to gross negligence in failing to provide electricity, and there is no support in the record for such an inference.

B. Even If Con Edison Had Failed In Its Duty To Supply Electricity, The Government Is Not Entitled To Recovery Under The Theory Formulated By The District Court

As noted above, the District Court's theory of "emergency assistance" is nothing more than a theory of quasi-contract applied to a particular kind of situation. Accordingly, the Government's recovery under this theory is precluded by all those circumstances that preclude a recovery in restitution, as stated in Point IV of this Argument. First, the measure of recovery is the benefit to Con Edison, not the cost to the AEC, and since Con Edison proved that it did not benefit by receipt of the 200 MW, the Government may have no recovery. Second, the AEC rendered performance with knowledge that Con Edison had repudiated the alleged agreement to pay a surcharge.

Moreover, even if Con Edison had failed in its duty to supply electricity, the "emergency assistance" doctrine still does not permit a recovery. It is evident that Section 115 of the Restatement of Restitution, upon which the District

(Continued from page 59)

duty. "The rule stated in this Section is not applicable unless . . . the person having the duty has been first requested to perform it, except where such request would be useless . . ." Restatement of Restitution § 115, Comment a (1937). This implies that the party requested to perform must either refuse or be unable to perform before the other may fulfill the duty.

Court based its theory, is quite narrow in scope and does not encompass the factual situation in this case. Section 115 applies only where the plaintiff has supplied "things or services . . . immediately necessary to satisfy the requirements of public decency, health, or safety." Again, although the shortage might have required voluntary reduction of power consumption by Con Edison's customers and perhaps voltage reductions, these situations do not rise to the level of danger to the public health or safety which is necessary to justify a quasi-contractual recovery. According to the testimony of Bertram Schwartz, there were only four days during the summer when voltage was reduced, and even without the 200 MW, there would have been, at best, only infrequent, brief, and rotated interruptions of service to some customers on a few days. (A991) Voltage reductions are not unusual nor are they a threat to public decency or safety. (A994) The examples given in Comment b to Section 115 (*e.g.*, burial of the dead, isolation of a person with a contagious disease, repair of a public road) show the restricted scope of the section and its inapplicability in the present case.

Also, Section 115 by its terms applies only where *immediate* action is required. Here, although Con Edison's power reserve was depleted, there was no immediate need for 200 MW, in Con Edison's system of over 7000 MW in order to prevent some imminent physical danger to the residents of the New York City area. (A991-A992) In fact, the Government did not act immediately. The White House was aware of the Ravenswood outage by the morning of July 22, 1970, but the AEC did not begin a power reduction until the morning of July 27. The type of immediate emergency envisioned in the Restatement is clearly of a more acute nature than the difficulty resulting from the Ravenswood outage.

The cases cited by the District Court are also inapplicable. *Peninsular & Oriental Steam Navigation Co. v.*

Overseas Oil Carriers, supra, has already been distinguished from the case at bar. *Wyandotte Transp. Co. v. United States, supra*, like *Peninsular*, is an admiralty case and merely deals with the parameters of relief granted the U.S. Government under Section 115 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, which imposed express duties upon shipowners whose vessels had sunk in navigable waters.

For the above reasons, the Government is not entitled to recovery on the District Court's theory of "emergency assistance."

VI. The Government Has Violated Con Edison's Right To Equal Protection Of The Laws

The Government, by its unjustified discriminatory treatment of recipients of power under the May 5 Plan, has denied Con Edison equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.* The Government invidiously discriminated against Con Edison by requiring it to pay a surcharge while imposing none upon any other recipient of power under the May 5 Plan. There was no rational basis for this discrimination, and any recovery based upon it is prohibited.

A. The May 5 Plan Is Subject To Equal Protection Scrutiny

Although an equal protection issue is usually raised in a case involving a state or federal statute, case law is clear that all governmental actions and exercises of power, statutory or not, are subject to equal protection scrutiny. *Fick*

* The equal protection guarantee of the Fourteenth Amendment applies to the federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

Wo v. Hopkins, 118 U.S. 356 (1886); *Davis v. Passman*, 544 F.2d 865, 869 (5th Cir. 1977).

The May 5 Plan, developed within the Executive Office of the President and administered by various agencies of the federal Government, is clearly a government action and therefore must pass muster under the Equal Protection Clause. Government action similar in character to that of the May 5 Plan has been the subject of equal protection analysis. For example, in *McCullough v. Redevelopment Authority of Wilkes-Barre*, 522 F.2d 858 (3d Cir. 1975), the court applied equal protection tests to certain aspects of a disaster relief program coordinated among the U.S. Department of Housing and Urban Development and other federal and state agencies.

B. The Government Either Created Two Classes Of Recipients Under The May 5 Plan Or Discriminated Between Recipients in a Single Class

The record is clear that the recipients of the first 450 MW released by the AEC pursuant to the May 5 Plan did not pay a surcharge on the power they received. (A88, A249-A250; A29, Op 6) The Government did not assess or even contemplate a surcharge at the time the 450 MW was released. (A29, Op 6) Only in the face of Con Edison's protests that it had been unfairly singled out to pay a surcharge did the AEC make what it believed would be futile attempts to negotiate a surcharge with the earlier recipients. (A45, Op 22; A1552, PX 19; A112-A114, A434-A435)

This inequality of treatment between the recipients of power may be viewed in two ways, each of which clearly raises the equal protection issue: (1) the Government created two classes of recipients of power under the May 5 Plan—those who were charged for the AEC's "losses" and those who were not; or (2) the May 5 Plan, although neutral on its face, was administered in an invidiously discriminatory manner.

When a statute or other government action creates classes of persons affected differently thereby, the Equal Protection Clause requires that the classification must meet a test of reasonableness whose strictness varies with the nature of the rights and classifications involved. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). Equal protection comes into play with equal force where a statute or other action, although fair on its face, is administered in a discriminatory manner. See *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956); *Yick Wo v. Hopkins*, *supra*. These principles apply not only to government actions that impose a burden but also to those that, as in this case, confer a benefit. See, e.g., *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

Accordingly, whether the actions of the Government in this case are deemed to have created *de jure* classifications or some less formal brand of inequality, there remains a glaring discrimination which is not permitted under the Constitution.

C. There Was No Rational Basis For The Government's Discrimination Against Con Edison

1. THE GOVERNMENT MUST DEMONSTRATE THAT THE CLASSIFICATION OR DISCRIMINATION IS RELATED TO THE PURPOSE OF THE MAY 5 PLAN

Mr. Justice Jackson, concurring in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) stated:

"I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation." 336 U.S. at 112.

Although the Supreme Court has since developed stricter equal protection standards where a classification is viewed

as "suspect," e.g., *In re Griffiths*, 413 U.S. 717 (1973) (alienage), or where the right involved is "fundamental," e.g., *Shapiro v. Thompson, supra* (right to travel interstate), the "rational basis" test articulated in *Railway Express* remains the traditional mode of equal protection analysis. See *Morey v. Doud*, 354 U.S. 457 (1957); *McGowan v. Maryland*, 366 U.S. 420 (1961). This traditional test should be applied here.*

2. THERE WAS NO RATIONAL BASIS FOR THE GOVERNMENT'S DISCRIMINATION AGAINST CON EDISON

The Government has never, either during the course of events in 1970 or at trial, attempted to justify its failure to assess a surcharge against the recipients of the 450 MW while seeking recovery of a surcharge from Con Edison. The AEC staff explained that it merely had forgotten to bill those recipients. (A440; A45, Op 22) This cannot form a "rational basis" justifying the discrimination against Con Edison because (1) the evidence is clear that there was in fact no oversight; and (2) even if there was, it still is not sufficient to justify the discrimination.

a. *The Evidence Does Not Support A Finding That The AEC Failed Through Oversight To Impose A Surcharge On The Other Recipients*

The evidence clearly indicates that as the May 5 Plan went into effect the AEC knew that any reduction of the power levels at its enrichment plants would result in additional costs of production. There was no oversight when the AEC failed to charge the first recipients of power under the plan, and consequently no possible basis, rational or

* Although the traditional test has required only "minimal scrutiny" of a government action, the United States Supreme Court has in recent terms demonstrated a willingness to maximize the force of this standard and apply "vigorous rational basis scrutiny." See G. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection. The Supreme Court 1971 Term*, 86 Harv. L. Rev. 1 (1972).

otherwise, for the Government's discrimination against Con Edison.*

George Quinn admitted that the AEC had experienced a loss of efficiency and higher production costs when the power levels were reduced over a period of years during the 1960's. (A75, Op 52, n. 2; A224-A225) In January 1970, only a few months before development of the May 5 Plan, the AEC released power to TVA, again losing efficiency and charging a power premium to TVA to offset the losses caused by the reduction. (A2321-A2322, DX D-8; A226) In early July 1970, the AEC reduced its power level under the May 5 Plan for the first time and did not attempt to recover its costs by imposing a surcharge or otherwise. (A28-A29, Op 5-6) In notifying the utilities of its participation in the May 5 Plan, the AEC had stated its assumption that any reduction would be sufficiently long to "justify the related mixing losses and other costs," but had not suggested that the utilities would be expected to absorb such costs. (A2027, A2029-A2030, A2031)

At the time of the release to Con Edison, George Quinn had been the AEC's assistant general manager in charge of the production program for nine years, throughout the time when the previous reductions were made. (A77) He had been involved in the uranium enrichment program since 1945. (A77) Others at the AEC presumably were similarly familiar with the operations of the enrichment process. It is at least curious that Quinn and the others suddenly lapsed into ignorance of a principle so familiar from the recent reductions and their previous years of experience with the process—i.e., a lower power level means increased costs of production.

As discussed earlier, the White House and OEP had no intention of imposing a surcharge on AEC releases of

* This Court may make its own finding of fact on this issue. When dealing with questions of constitutional magnitude, a reviewing court should make an independent review of the District Court's findings of fact; the usual "clearly erroneous" standard is inapplicable. *Guzick v. Drebush*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). See *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964); *Brookhart v. Janis*, 384 U.S. 1, 4n.4 (1966).

power pursuant to the May 5 Plan. The only plausible explanation for the eventual attempt to impose a surcharge on Con Edison is that certain members of the AEC staff, without discussing the surcharge's discriminatory effect with the White House or the AEC commissioners, decided on their own to begin attempting to recover the AEC's costs.

The AEC staff's actions were not consistent with the alleged discovery of an error and a good faith attempt to correct it. On July 23 and 24, during communications with Con Edison concerning release of the 200 MW, the AEC staff, far from attempting to explain its sudden change of mind, did not even mention that the previous recipients had paid no surcharge, even in the face of Luce's repeated statements that Con Edison would pay what the others had paid.* (A36-A37, Op 13-14; A864) The AEC staff attempted to impose the surcharge through its suppliers without notifying Con Edison. Not until August 6 did Con Edison learn—and even then from a non-AEC source—that there had been no surcharge imposed on the earlier recipients, and not until August 10, when Con Edison's Bertram Schwartz visited the AEC staff in Washington, did they first advance the explanation that they had simply "goofed." (A1009) When Roddis made Con Edison's initial protests to Quinn on August 6 and 7, Quinn did not state that the AEC had made an administrative error with respect to the previous reduction, nor did he attempt to justify the discrimination in any other way. (A106-A109, A379-A383, A426-A428, A907-A912)

Instead of openly disclosing its alleged change of mind, the AEC staff seemed determined to conceal it. Until

* The AEC's actions may go beyond bare nondisclosure. When Quinn told Luce on July 24 that the 200 MW reduction would be more expensive than the 450 MW reduction, he clearly implied that the others had in fact paid a surcharge and Luce inferred this from his statement. (A37, Op 14; A864) Quinn knew at the time, of course, that the AEC had not charged them for a surcharge.

August 6, when Con Edison learned of the discrimination, the AEC staff failed to mention to anyone outside the AEC the discriminatory nature of the 200 MW surcharge. Indeed, there is no evidence that the AEC commissioners were advised of the discriminatory nature of the surcharge imposed on Con Edison until August 8. (A433)

The above facts make it clear that the AEC's discrimination against Con Edison was not the result of any claimed administrative error. On the contrary, it appears that the AEC staff decided—without any basis, rational or otherwise—that it would attempt, without any authorization from the promulgators of the May 5 Plan, to recover its alleged costs from Con Edison even though it had not done so with respect to the earlier recipients under the May 5 Plan. This kind of arbitrary, invidious discrimination by the Government between recipients of its emergency assistance is repugnant to the very essence of equal protection.*

- b. *Even If The AEC Was Guilty of an Oversight In Failing To Impose A Surcharge On The Previous Recipients, A Correction Of The Error Does Not Form A Rational Basis For Discrimination Against Con Edison*

Assuming that the AEC simply neglected to recover its costs from the earlier recipients of power and that it remembered to recover them from Con Edison, there still is no rational basis for the discrimination. A distinction in the treatment of business entities must be justified by its reasonable relation to genuinely different characteristics of the businesses involved. *Morey v. Doud*, 354 U.S. 457 (1957). And where such a distinction or classification rests

* If the AEC had been serious about correcting its error, it could have sued in quasi-contract to recover the benefit conferred on the earlier recipients. Instead, plaintiff brought suit only against Con Edison.

on grounds that are not reasonably related to the achievement of the objectives of the challenged statute or program, the equal protection safeguard is offended. *Johnson v. Robison*, 415 U.S. 361 (1974); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Railway Express Agency v. New York*, *supra*. Here the previous recipients of power, as utilities or electric systems facing shortages during the summer of 1970, were situated identically with Con Edison. There was no relevant distinction between them and Con Edison, and the Government made no attempt to prove such a distinction. Moreover, the alleged basis for the discrimination—a need to recoup costs not previously recognized—is not even tangentially related to the purpose of the May 5 Plan—to provide the public with an adequate supply of electricity during a period of high consumption.

The Supreme Court has firmly held that a mere saving of costs cannot justify an otherwise invidious classification; the Government “may not protect the public fisc by drawing an invidious distinction between classes of its citizens.” *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974). See also *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)*

The Government cannot justify its discrimination on the ground that it was purely accidental and the result of an unfortunate oversight. Con Edison should not be held liable for more than one and a half million dollars simply because it was unfortunate enough to be the only utility against whom the AEC staff members remembered to assess a surcharge. As this Court has stated:

* Although the court in these cases was applying “strict scrutiny” and required a showing of a “compelling state interest” rather than the traditional “rational basis”, the court made it clear that cost savings is not a constitutionally permissible state objective even where the traditional test is applied. See 394 U.S. at 627, 633.

“ ‘Equal protection of the laws’ means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, ‘we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.’ *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967).” *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (emphasis supplied).

See also Berry v. School Dist. of Benton Harbor, 505 F.2d 238, 243 (6th Cir. 1974); *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172-73 (5th Cir. 1972). Where the Government confers a benefit on some members of a class and fails to confer the same benefit on others in the class merely as “a matter of luck”, equal protection of the laws is lacking. *Gordon v. Forsyth County Hospital Authority, Inc.*, 409 F. Supp. 708, 727, (M.D.N.C. 1976) *aff’d in part and vacated in part on other grounds*, 544 F.2d 748 (4th Cir. 1976) (patients arbitrarily transferred from one hospital where free medical care was available to another where they were charged for care).

D. Applicability to Present Case

This case went to trial because Con Edison believed that its Government had irrationally discriminated against it. (A830-A831) The “equal treatment” theme of Con Edison’s protest has been consistent and clear from the beginning. Con Edison, of course, differs in many respects from the ordinary citizen seeking redress of prejudicial government action, and the discrimination that occurred here is not the usual type litigated under the equal protection clause. But Con Edison in this case is not in a position different from that of an ordinary citizen facing government power and is no less entitled to the constitutional

safeguards designed to restrain that power. As the Supreme Court has cautioned, "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey v. Doud*, *supra* at 464.

"Orthodox equal protection doctrine," wrote Judge J. Skelly Wright, "can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional." *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). See also *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Regardless of the novelty of this case, it is certain that the Government has without justification imposed a burden, in the form of a surcharge, upon Con Edison while failing to impose one upon others similarly situated, and the Government has thereby denied Con Edison equal protection of the laws. For this reason alone, this Court should reverse the judgment of the District Court and direct entry of an order dismissing the Government's complaint.

VII. Because It Sought Equity With Unclean Hands, The Government Should Not Have Been Granted Equitable Relief

The District Court abused its discretion by affording the equitable remedies of estoppel and restitution to the Government, which had come before the Court with unclean hands.

It is a fundamental rule that one who comes into equity must do so with clean hands. *Frad v. Columbian Nat'l Life Ins. Co.*, 191 F.2d 22 (2d Cir. 1951), *cert. denied*, 342 U.S. 904 (1952). This principle "imports that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable." *Koolvent Metal Awning Corp. of America v. Bottom*, 205 F.2d 209, 214 (8th Cir. 1953). "Far more than a mere banality," the doctrine

"is a self-imposed ordinance that closes the doors of a

court of equity to one tainted with inequiteness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945).

The Government here was guilty of such inequitable conduct. It formulated a plan of emergency assistance magnanimous on its face, proceeded to provide such assistance to several utilities without charging them for its costs, and then, in an abrupt change of policy, disingenuously justified as an administrative oversight, attempted to exact a \$1.5 million surcharge from Con Edison while intentionally concealing from it the fact that previous recipients had paid nothing. All equitable relief accordingly should have been denied by the District Court.

The Government in this case is tainted not only by its overt discrimination in administering the May 5 Plan, but also by its direct and intentional concealment of that discrimination. It is undisputed that when Charles Luce told George Quinn that Con Edison would pay whatever surcharge had been paid by earlier recipients, Quinn remained silent even though he knew that the others had paid no surcharge. (A 36-A37, Op 13-14) Quinn went beyond mere non-disclosure by telling Luce that the 200 MW reduction would be more expensive than the 450 MW reduction, clearly implying that the earlier recipients were in fact paying one for that reduction. (A37, Op 14; A863) Upon hearing this, Luce reiterated his position that all recipients should receive equal treatment under the Government plan. (A864-A865) It is unlikely that Luce would have agreed to pay any surcharge at all if Quinn had broken his silence and apprised him of the facts, particularly since Luce knew that the White House had already decided that the AEC would release the power. Yet it was upon these very state-

ments by Luce, so influenced by the Government's own misconduct, that the District Court based its findings of estoppel and quasi-contract. (A56, A59, Op 33, 36) The clean hands doctrine precludes equitable relief under such circumstances, where a plaintiff remained silent in the face of a defendant's misunderstanding and then seeks to take advantage of the forfeiture that has resulted. *See, e.g., Storf v. Papalia*, 24 N.J. Misc. 145, 46 A.2d 907 (Ct. Ch. 1946); *Kroeger v. Kastner*, 212 Ind. 649, 10 N.E.2d 302 (1937).

The nature of this case, affecting assistance to the public, requires special attention to the clean hands doctrine.

“[W]here a suit in equity concerns the public interest as well as the private interests of the litigants [the clean hands] doctrine assumes wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.” *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, *supra* at 815.

Although Con Edison is a private party, it is the sole provider of a basic commodity to the public of the New York City area. The Government's inequitable conduct touches not only Con Edison but affects directly the people of New York. Indeed, the May 5 Plan was developed not to benefit Con Edison, but the public at large. Where the Federal Government, empowered by the public to act in its interest, brings a lawsuit arising out of a program of assistance to the public, that suit necessarily involves a distinct public interest not only in equal treatment under this emergency program but also under future government programs. The District Court apparently was not mindful of these interests when it granted equitable relief in the face of the Government's inequitable conduct.

VIII. The Government Is Estopped By Its Inequitable Conduct From Seeking A Surcharge From Con Edison

Because the Government represented to Con Edison that previous recipients of power had paid a surcharge, and because Con Edison relied to its detriment on this representation in making the very statements that gave rise to a finding of liability by the District Court, the Government is estopped from seeking a surcharge from Con Edison.

Only on July 24, 1970, after the release of power to Con Edison was mandated by the White House and publicly announced—without any mention that the Government would attempt to recover connected costs—did Quinn of the AEC first inform Con Edison that a surcharge would be imposed. At that time Luce of Con Edison told Quinn that Con Edison would pay on the same basis as other recipients of power under the Government plan. (A36, Op 13) Quinn, knowing very well that no surcharge had been imposed on these others, then informed Luce that the 200 MW reduction would be more expensive than the 450 MW reduction, clearly implying that the others had in fact paid a surcharge.

Thereafter, when Con Edison learned that the others had paid no surcharge, it advised the AEC and others immediately that Con Edison would refuse to pay on other than an equitable basis. Despite this clear refusal, the AEC continued throughout the summer to supply Con Edison with the power even though it rightfully could have terminated the release pursuant to the terms of its agreements with its suppliers. (A1546-A1547, PX 15; A1548-A1549, PX 16; A1550-A1551, PX 17) There was no testimony that the AEC ever told Con Edison that it would terminate the power reduction unless Con Edison agreed unconditionally to pay the claimed surcharge.

This conduct estops the Government from seeking a surcharge from Con Edison. First, Quinn, with knowledge

of the facts to the contrary, made an implied representation to Con Edison that the previous recipients had paid a surcharge. Second, Con Edison has a right reasonably to rely upon that representation. Third, Con Edison was ignorant of the fact that the previous recipients had paid no surcharge. Fourth, Con Edison relied on this representation in stating that it would pay what the previous recipients had paid. This reliance will result in a detriment to Con Edison if the Government is not estopped from asserting its present position. These factors give rise to an equitable estoppel against the plaintiff. See *Russell Corp. v. United States*, 537 F.2d 474 (Ct. Cl. 1976); *Emeco Industries, Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973).

It is immaterial that Quinn did not expressly state that the previous recipients had paid no surcharge; his words clearly implied it. And his silence in the face of Luce's assertion that Con Edison would pay what the others had paid only served to reinforce the implication.

Moreover, when Con Edison refused to pay a surcharge except on an equal basis, it reasonably relied on the AEC's failure to terminate the power supply as a representation that its "equal treatment" position had been honored by the AEC, because, in the absence of a contract between it and the AEC, it could reasonably assume the AEC was able to end the reduction at any time (if the AEC could persuade the White House that the reduction should be terminated). Con Edison could reasonably assume that a continued supply of power indicated retraction of the AEC's absolute insistence on a surcharge since any surcharge was contrary to the publicly announced May 5 Plan, and was only mentioned to it after the White House press release had already been issued.

For these reasons, the Government should be estopped from claiming a surcharge against Con Edison.

IX. Plaintiff Failed At Trial To Prove It Suffered Any Actual Damages, and The Methodology By Which It Attempted Such Proof Fails Accurately to Show the Actual Economic Impact of the 200 MW Reduction

The District Court concluded that plaintiff should have judgment for \$1,576,795 in damages, the number arrived at in a document prepared by plaintiff in April, 1977—on the very eve of trial—PX 41, a document admitted into evidence over the objections of defendant. It is respectfully urged that the District Court erred in making such award, for the following reasons discussed more fully below:

1. The AEC suffered no losses because all the costs it incurs in the uranium enrichment program (including any costs claimed here) are by statute passed along to its uranium enrichment customers;
2. The AEC suffered no losses because any costs incurred in connection with the 200 MW reduction were more than covered by the 15% contingency factor which the AEC adds to the price it charges for enriched uranium to cover such matters as production interruptions, et cetera;
3. The AEC suffered no losses because in 1970 it in fact had lower actual expenses because of the 200 MW reduction while taking in the same revenue, and any financial impact would be felt only at such time as the "lost" production would be sold, an event that has not yet occurred in view of the AEC's increasing pre-production inventory;
4. If any damages should be imposed, AEC "losses" should at the outermost only be the kinds of losses discussed between Luce and Quinn, essentially power efficiency losses, rather than including all manner of extraneous costs, such as the AEC's payment to localities in lieu of taxes;
5. If any damages should be imposed, AEC "losses" should at the outermost only be the worth of a "power pre-

mium," the kind of surcharge the AEC charged in other instances in 1970 to avoid equivalent "losses," and which in fact is much lower than the claimed monetary surcharge;

6. If any damages should be imposed, AEC "losses" should, in view of the AEC's reduction to others without a surcharge, at the outermost only be the excess of losses in the 200 MW reduction over what should have been charged the earlier recipients;

7. If any damages should be imposed, AEC "losses," at the outermost, should be determined in a manner which takes into account the effect of time upon the actual economic impact of the 200 MW reduction upon the AEC;

8. If any damages should be imposed, AEC "losses" should be determined, at the outermost, in the same fashion as ERDA currently determines surcharges, namely on the basis of an "average" surcharge in which all reductions occurring simultaneously are treated equally; and

9. PX 41, the document relied upon by plaintiff, was erroneously admitted into evidence.

At the outset, it is well to establish one central fact: as a result of the 200 MW reduction for Con Edison, plaintiff did not suffer any actual increased costs. To the contrary, because plaintiff purchased less power during the reduction, the AEC's total actual costs during the period of reduction were in fact lower than they would have been without the 200 MW reduction. (A601-A602; A1590-A1602, PX 41) It is true that the AEC produced fewer SWUs because of the 200 MW reduction, but that fact did not mean any financial loss to the AEC. The AEC's enrichment service is just that—a service to the utilities which use it and, through them, to the American public. It was not intended to be a source of profit to the AEC. By statute and by regulation implementing that statute, the AEC

was simply to recover its production costs associated with the enrichment process. A regulation which would have permitted the AEC to make a commercial profit was barred by Congress through amendment of the statute. (A727) Equally significant, the AEC was in fact *required* to recover production costs from its enrichment customers. Thus, the enrichment program was neither to be a source of monetary gain nor loss to the AEC under the plan established by Congress; the enrichment customers were to bear all costs automatically.

This statutory framework, and the fact that the AEC's total costs actually declined because of the 200 MW reduction, forced plaintiff to come up with an imaginative alternative as to its "losses." Plaintiff has attempted to do so in PX 41, which differs substantially from previous calculations made by the Government since July 28, 1970.*

A. Plaintiff's Latest Approach to Damages: PX 41

Plaintiff argues that the unit cost of production of the fewer SWUs which were actually produced increased by \$1.9163 because of the 200 MW reduction. Plaintiff multiplies the per unit increased cost which it has calculated, \$1.9163 SWU, times the number of total SWUs actually produced during the 200 MW reduction (822,833 SWUs) and asserts that the resulting number, \$1,576,795.00, represents its "losses." Con Edison contends that, while plaintiff's arithmetic may be correct, its characterization of the resulting number as "actual damages" is conceptually erroneous and untenable.

* For various approaches and computations used by the AEC, see A2072-A2073, DX X-3; A2078, DX D-4; A2082-A2085, DX I-4; A2090-A2093, DX Q-4; A2121-A2123, DX Z-4; A2124-A2132, DX A-5; A2139-A2149, DX C-5; A2151-A2159, DX F-5; A2194-A2196, DX W-5; A2203-A2214, DX Z-5; A2215-A2220, DX B-6; A2221-A2222, DX D-6.

Earl Sullivan, the ERDA employee largely responsible for preparation of PX 41, could only say, as to its methodology: "We recognized that there may be other ways, but we felt that this would be a supportable way."* (A588)

To arrive at the increased per unit cost shown in PX 41, plaintiff has, from various sources, purported to compile (1) cost data, both actual (with the 200 MW reduction) and hypothetical (what costs would have been with the 200 MW reduction) (A1590-A1602, PX 41, Table I and Appendices 1-3) and (2) SWU production data, both actual, as it occurred with the 200 MW reduction and hypothetical, what it would have been without the 200 MW reduction. (A1593-A1595, A1602, Table II and Appendix 4) Both in the hypothetical SWU production and, to a somewhat lesser extent, in the "actual" SWU production calculations, plaintiff has relied upon estimated extrapolations from and interpolations between estimates of separative capacity prepared by Union Carbide (A612; A644-A645, A1602, Appendix 4); these estimates of separative capacity purport to estimate the rate at which SWUs are produced at different levels of electrical power in the three gaseous diffusion plants. Other information used by the plaintiff in PX 41 also comes from other entities, Union Carbide and Goodyear Atomic Corporation. Such, in the briefest of outline, is the basis upon which plaintiff rests its prayer for damages.

Since PX 41 was prepared on the eve of trial, Con Edison was prevented from studying it and its source material as it would and could have done in other circumstances. Similarly, because of the brevity of time, Con Edison was prevented from examining third parties with respect to their roles in developing material inserted into PX 41.

* In fact, neither he nor Walter Scarbrough, the other ERDA employee primarily involved in preparation of PX 41, considered other methods or such factors as those listed on pages 76-77, *supra*. (A588, A591, A594-A598, A617, A621, A632, A638, A674, A678-A684, A698-699)

B. Plaintiff Suffered No Damages Since By Statute It Has Passed On The "Losses" It Claims To Its Enrichment Customers

The "losses" claimed by plaintiff were in fact required by statute to be passed along to its enrichment customers and such losses have in fact been passed along as required. Plaintiff's Answers to Defendant's Interrogatories—Set No. 1, 13-14. (A1374-A1375)* 42 U.S.C. § 2201(v)(B) requires that "... prices [for SWUs] ... shall be on a basis of recovery of the Government's costs over a reasonable period of time." By virtue of that fact, plaintiff factually and legally has not suffered any actual damages. Plaintiff should not be permitted to recover again from Con Edison what it has already recovered elsewhere.

This conclusion follows from legal principles well established in various branches of the law. The object of the law in fixing the amount of damages for a breach of contract is to place the plaintiff in as good a position as he would have been if the defendant had abided by its agreement. *Dillon v. Migner*, 39 App. Div.2d 759, 287 N.Y.S.2d 519 (2d Dept. 1968). Damages should indemnify a party for the gains prevented and losses sustained by the breach, neither leaving him in a worse nor placing him in a better position than if the contract has been fully performed. *Weirton Steel Co. v. Isbrandtsen-Moller Co., Inc.*, 126 F.2d 593 (2d Cir. 1942); *Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962); *United States v. Hatahley*, 257 F.2d 920 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958). *Odysseys Unlimited, Inc. v.*

* Plaintiff never amended its answers dated March 7, 1977 to these Interrogatories before trial; at trial, however, Eugene Schmidt, an employee of ERDA, testified that all the purported "losses" had not in fact yet been recovered by plaintiff, but would be recovered by 1980, since ERDA chooses to recover its costs over a ten year period. (A715) Assuming that the sworn answers to interrogatories are partially erroneous, the legal conclusion reached in the present analysis remains the same.

Astral Travel Services, 77 Misc.2d 502, 354 N.Y.S.2d 88 (Sup. Ct., Nassau Cty. 1974). As one court put it, "It is elemental that damages cannot be recovered in excess of the actual damage sustained." *France and Canada S.S. Corp. v. Berwind-White Mining Co.*, 229 N.Y. 89, 95, 127 N.E. 893 (1920).

A corollary flowing from these principles holds that a defendant in an action for breach is entitled to show any matters which go to reduce the amount of loss actually suffered by the plaintiff. As Section 352 of the Restatement of Contracts states:

"Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable *unless such gains could not have been made had there been no breach.*" (emphasis supplied)

One case is almost identical to the situation in the case at bar and is clear precedent. In *The Plimpton Manufacturing Co. v. United States*, 15 Ct. Cl. 14 (1897), the Postmaster-General awarded plaintiff a contract to supply the Post Office with all its requirements of stamped envelopes and newspaper wrappers for four years. When the plaintiff was unable to commence production as scheduled, the Post Office placed several orders for envelopes and wrappers with the contractor who preceded plaintiff. The former contractor received payment at the rate provided in its former contract with the Post Office or \$11,600 more than the rate under plaintiff's contract. When the plaintiff began filling later orders, the Post Office paid for them, but deducted the \$11,600. The envelopes and wrappers purchased from the former contractor were sold to the public at the scheduled prices which prevailed during the term of the old contract, but those later manufactured by plaintiff were sold at a reduced price proportionate to the reduction in the contract price. Plaintiff sued for the \$11,600, and the Government counterclaimed, apparently in the same

amount, for damages resulting from plaintiff's failure to manufacture envelopes and wrappers according to the contract terms. The court dismissed the counterclaim, holding

"... [T]hat the defendants suffered no actual loss by the transfer of orders. *Section 3915 of the Revised Statutes required the Postmaster-General to provide suitable letter and newspaper envelopes. . . . and to sell the same to the public, as nearly as may be, at the cost of procuring them, with the addition of the value of the postage stamps impressed thereon. In compliance with this provision of law, the Postmaster-General contracted with Reay [the former contractor] to manufacture and deliver envelopes, and fixed a schedule price for sales based upon Reay's contract. At the expiration of Reay's contract he made a more favorable contract with the claimants. Reay, however, continued to manufacture for about three months after the expiration of his contracts. The old schedule of prices was maintained until Reay ceased to manufacture; then only did the reduced prices take effect. It is plain, therefore, that there was no loss to the defendants. The loss, even if the claimants were guilty of a breach of their contract which caused one, came out of the general public, who paid the defendants a premium which insured them against loss. To allow the counterclaim would be to pay the defendants for a loss which they have not suffered.*" 15 Ct. Cl. at 21 (emphasis supplied).

The parallels with Con Edison and the AEC are manifest. As it did against Plimpton, the Government claims damages arising out of Con Edison's breach of contract. But like the Post Office in *Plimpton*, the AEC is required by statute to pass on its costs to its customers and did so. The holding in *Plimpton*, therefore, dictates that the AEC can recover no damages based on Con Edison's alleged breach because if there were any loss it was passed on to the AEC's customers.

Con Edison's position is also closely analogous to that of a defendant in an antitrust suit who asserts the so-called "passing-on" defense. When a plaintiff shows that it has been injured by overcharges deriving from a defendant's price discrimination or price-fixing, the defendant may attempt to show that the plaintiff suffered no actual injury because the plaintiff "passed on" its higher costs to its customers by charging them higher prices. Because the plaintiff has suffered no real injury, it has no cause of action. Although the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), limited the application of the "passing-on" defense because of the great difficulties of proof usually involved, it recognized:

"...that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer." 392 U.S. at 494.

This exception to the general prohibition of the passing-on defense has been recognized in later lower court decisions. *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *aff'd*, 404 U.S. 548 (1972); *Obron v. Union Camp Corp.*, 355 F. Supp. 902 (E.D. Mich. 1972), *aff'd*, 477 F.2d 542 (6th Cir. 1973).

The kind of "passing on" undertaken by the AEC in this case falls within the exception to *Hanover*. Like an antitrust defendant, Con Edison has allegedly caused a pecuniary loss to the AEC. The AEC has admitted that the "increased costs attributable to the reduction were reflected in subsequent revisions to the AEC charge for separative work." (A2480, DX C-11) This "passing on,"

carried out pursuant to Section 161(v)(B) of the Atomic Energy Act, is similar to a cost-plus contract situation where the passing-on defense is sanctioned because it is easy to prove that any loss was absorbed by the allegedly injured party's customers. Therefore, the AEC's passed-on losses, if proved, should not be assessed as damages caused by Con Edison. To do otherwise would permit an unconscionable double recovery, a particularly peculiar result where, as here, plaintiff's recovery is based upon equitable causes of action.

Similar reasoning has prevailed in other situations; the courts regularly find that a defendant is entitled to a reduction of any recovery by any amount that reduces the actual loss suffered by the plaintiff. *See, e.g., Burke v. Sinclair Refining Co.*, 183 F.2d 239 (3d Cir. 1950); *O'Meara v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925); *Berlitz Publications, Inc. v. Berlitz*, 44 App. Div.2d 665, 354 N.Y.S.2d 421 (1st Dept. 1974); Uniform Commercial Code §§ 2-706, 2-708, 2-712 and 2-713.

The District Court rejected this reasoning on the basis that the "government can sue and be sued on contract claims arising out of its uranium enrichment program" and "is to be treated as any other business entity." (A66, Op 43) It is respectfully urged that this rejection was erroneous. That the Government may sue and be sued on contract claims does not preclude a defense that double recovery is improper. It also does not distinguish the instant situation from *Plimpton*, since the Post Office there obviously was both being sued and suing (through its counterclaim). While 28 U.S.C. § 1345 gives Federal courts jurisdiction to try government contract claims, certainly it does not abrogate substantive federal statutes, such as 42 U.S.C. § 2201, any more than substantive federal statutes are abrogated in cases involving commercial businesses.

The District Court also stated that the plaintiff would not obtain a windfall, since under "42 U.S.C. § 2201, a recovery in this action will accrue to [enrichment customers'] benefit" and that such monies will be required

to be passed on to the customers. (Op 44, A67) But such reasoning, if accurate, would equally apply in the *Plimpton* situation and does not diminish the vitality of the principles of that case. The District Court's conclusion that the "evidence is clear that in the event of a recovery, the government will be required under the statute to pass such monies on to the customers of its enrichment program" (A67, Op 44) is without foundation. The statute is silent on the matter, and the only evidence purporting to support the Court's finding was a conclusory statement, permitted over defendant's strong objection, by Eugene Schmidt, an employee of ERDA, who based his belief simply on talks with other personnel at ERDA. (A736) Schmidt admitted that ERDA had *not* entered into any contractual agreements with its enrichment customers to that effect. (A736) Schmidt also admitted that *future* enrichment customers to whom judgment monies would allegedly be passed would not necessarily be the same as the *past* customers to whom such costs already had been passed. (A737) Thus, any "passing along" of a recovery herein will not necessarily be to the customers to whom the costs have already been passed on. Moreover, there is no actual evidence that any such recovery will in fact be passed on, so that double recovery by the United States still appears the result of recovery herein. For the above reasons, the District Court's conclusion that the *Plimpton* principle was inapplicable was erroneous.

C. Plaintiff Has Not Been Damaged Since AEC Costs Were Covered By Its 15% Contingency Factor

As Dr. Leonard Geller, defendant's expert witness,* and Eugene Schmidt, plaintiff's witness, testified at trial, the AEC calculations for determining the price to its enrichment

* Dr. Geller, who is associated with the S. M. Stoller Corporation, consultants in the nuclear energy and fuel field, and who obtained his Ph.D. in mathematics from the Massachusetts Institute of Technology (A1030), was found qualified by the District Court as an expert witness in the areas in which he testified. (A1059-A1061) Dr. Geller has wide experience in the nuclear energy field, including the AEC's method for determining the price for SWUs. (A1030-A1059)

customers for separative work units includes a "contingency" factor of 15%. (A732-A733; A1136-A1137) This factor is intended to account for essentially any variation from the assumptions the AEC has made in deriving the base cost of separative work, such as altered modes of operating the production plants, *e.g.*, higher or lower power and high labor costs. (A1137) Dr. Geller testified that in his opinion increased production costs occasioned by the 200 MW reduction would be within the scope of the contingency factor, specifically as an altered mode of operations of the plant. In addition, Schmidt, presented by plaintiff as someone involved in and knowledgeable of the Government method of calculating uranium enrichment charges, testified that this contingency factor covered such matters as "unforeseen costs and production interruptions." (A733; A1137) The 15% contingency factor amounted to $0.15 \times \$27.74 = \$4.16/\text{SWU}$ (A2425, DX V-9), whereas the effect of the 200 MW reduction upon the SWU price was only $\$0.015/\text{SWU}$ according to Schmidt. (A734-A735) Consequently, the 15% contingency factor amply covers any alleged cost effect of the 200 MW release.

George Quinn testified that such costs would not be covered by the 15% factor since that factor was primarily designed to cover escalation in costs (A526) and the District Court accepted Quinn's testimony in rejecting Dr. Geller's assertion. (A51) However, Quinn's principal expertise was in the production side of the AEC and he was not shown to have any particular knowledge in the areas of cost and pricing. Indeed, he had relied entirely upon the accounting personnel for the derivation of the AEC's original 5.41 mill assessment against Con Edison. (A333-A338) The great weight of the evidence was thus clearly against Quinn's testimony, and the District Court erred in rejecting the testimony of Dr. Geller and Schmidt on this point. Since the kinds of costs claimed by the plaintiff were already more than covered by the 15% contingency factor, plaintiff cannot be deemed to have suffered

damages from a "change . . . in operational levels" mandated by the White House.

D. Plaintiff Would Suffer No Loss Until The Lost Production Would Be Sold

As noted earlier, the actual expenses incurred during the 200 MW reduction, and generally in fiscal year 1971, were approximately \$1.4 million less than they would have been had the reduction not taken place. (A600-A601; A1590, PX 41) Moreover, the revenues taken in by the AEC in fiscal year 1971 were unaffected by the 200 MW reduction, since the AEC was not prevented by the reduction from meeting all contractual obligation to its enrichment customers. The lost production did not result in any lost sales in fiscal year 1971. (A752) The initial economic impact of the reduction in fiscal year 1971 was thus a net benefit to the AEC. Properly analyzed, this benefit would only be offset at any later time when the fact that there were fewer SWUs produced would mean lost sales and revenue. However, the evidence clearly shows that in 1970 and in succeeding years, the AEC possessed huge stockpiles of enriched uranium for future sale. Indeed, the size of the stockpile, known as the "pre-production inventory," actually was on the increase in the years succeeding 1970. At June 30, 1970, the beginning of fiscal year 1971, the inventory was approximately 16 million SWUs (A1676); by 1977, the inventory had reached approximately 28 million SWUs. (A729) It is thus clear that the "lost SWUs" had not by the time of trial resulted in any actual loss to the plaintiff. Moreover, in view of the increasing size of the inventory, it is questionable whether the plaintiff would ever need its lost SWUs, and hence questionable whether these lost SWUs would ever result in an actual economic loss to plaintiff. For that reason, no actual damages were proven.

E. Exhibit PX 41 Was Erroneously Admitted into Evidence

The basis for the calculation of damages was PX 41, a document admitted into evidence over the objection of the

defendant. PX 41 purports to represent various data and also calculations made from that data. As such it is a hybrid document, and one clearly made for the purposes of the present suit. The validity of the figures resulting from the calculations (which were made by employees of the plaintiff) rests upon the data which, however, as the evidence clearly shows, were derived in very large measure not from business records of the plaintiff but from the independent contractors who manage the gaseous diffusion plants, Union Carbide and Goodyear Atomic Corporation. (A561-A564, A611-A617)

For example, crucial to the plaintiff's calculation of the hypothetical production of SWUs, absent the 200 MW, and hence, ultimately, of the purported damages are the separative capacity estimates contained in Appendix 4 to PX 41. As Raymond Sullivan, one of the drafters of PX 41, testified, "We used the operating contractors' documents pertaining to the capacity of the gaseous diffusion plants at various power levels." (A563) In fact, the source document for Appendix 4, a Union Carbide document marked PX 33, was not admitted into evidence because of the Government's failure to show an exception to the hearsay rule as stated by the District Court. (A544, A548-A549) It is respectfully urged that the admission of PX 41 (including its Appendices) was error. If it was improper to introduce a Union Carbide document for want of an exception to the hearsay rule, it is equally improper to introduce the data contained in that document because it has simply been copied by the witness. Fed. R. Evid. 803(6). (A562-A564)

Similarly, Sullivan admitted that in preparing PX 41, he "got from the operating contractors certain logs of their power system operators . . . [and] . . . used billing data that we received from the power suppliers." (A562) Such information infects the entirety of the report and should have been stricken. PX 41, not having been shown to fit within any exception to the hearsay rule, should have been rejected.

F. The Methodology of PX 41 Does Not In Fact Represent Actual Damages Suffered by Plaintiff

Assuming *arguendo* that PX 41 was properly admitted into evidence, plaintiff's claim for damages of \$1,576,795 must nonetheless fail, since the methodology of PX 41 does not represent actual damages in fact suffered by plaintiff.

As mentioned earlier, plaintiff in PX 41 attempts to compute the increase in unit cost of production of SWUs resulting from the 200 MW reduction and then multiplies that "per unit cost increase" times the SWUs produced during the reduction to arrive at a "total increased cost" figure of \$1,576,795. That term is extremely misleading, as it implies that the AEC's total actual costs increased because of the 200 MW reduction, whereas in fact the AEC's actual costs decreased because of the reduction, a fact made evident by a comparison of Tables I(1) and I(2) within the very same exhibit. (A1591-A1592) The \$1,576,795 figure simply does not accurately reflect the reality of the economic impact of the 200 MW reduction upon the AEC and the methodology of PX 41 is thus flawed in its basic concept.

The methodology of PX 41 fails to take into account many factors which must be considered in evaluating the actual economic impact of the 200 MW reduction. First, it ignores the fact that the costs allegedly involved were already provided for and more than covered by the 15% contingency factor which the AEC includes in its charges for SWUs. See Point IX(C), *supra*. Second, it fails to consider the fact that the loss in production occasioned by the 200 MW reduction did not interfere at all with the AEC's ability to meet its then current contractual requirements for enriched uranium, and that any consequent financial loss to the AEC would only be felt at such time as the AEC would have been unable to meet the demand for SWUs because of the fact that the "missing" SWUs were not in existence. Since the AEC's inventory of SWUs has actually increased since 1970, such loss has not yet been felt and may never be. Moreover, even if damages were suffered, PX 41 fails to recognize many varied factors, discussed hereinbelow, crucial to proper analysis of the situation.

1. PLAINTIFF'S DAMAGES SHOULD BE LIMITED TO POWER EFFICIENCY LOSSES

As Luce testified, he was told by Quinn on July 24, 1970 that the AEC wished reimbursement of efficiency losses incurred as a result of the release of the 200 MW. (A819) Plaintiff's witness and employee, Sullivan, testified that the power utilization index, a measure of power efficiency, is a standard measure of efficiency in the industry. (A617)

Dr. Leonard Geller, defendant's expert witness, prepared a calculation (assuming data contained in PX 41) which represents power efficiency losses attributable to the 200 MW release, which, as he testified at trial, was the way he would also interpret "efficiency" losses in the present context, i.e., in the sense in which persons in the industry usually mean the term. (A1138; A2424, DX U-9)

Dr. Geller calculated the efficiency losses in this fashion by assuming the data supplied by plaintiff for the power cost and the SWU production both with and without the 200 MW, deriving a power efficiency factor (Unit Power Cost of Separative Work) both with and without the 200 MW reduction, and deriving a real, but small, decrease in power efficiency because of the 200 MW reduction: \$0.1520/SWU. He then multiplied that efficiency difference times the number of SWUs actually produced to arrive at a power efficiency loss figure of \$125,092. To that he added the plaintiff's figure of \$24,000 for extraordinary maintenance (although, as he testified at trial, this stretched the concept of "efficiency") because it might be argued that efficiency of utilization of the equipment extends to any additional costs associated with its use. (A1141) The total "loss" under this approach was thus \$149,092. (A2424, DX U-9)

The District Court rejected this approach on the ground that Con Edison had "agreed to pay the surcharge as calculated by the AEC." (A68, Op 45) However, as argued in Part II of this Argument, any agreement by Con Edison was not a *carte blanche* to the AEC. If any agreement was in fact made, it was related to the kinds of losses that

the parties mentioned during the conversation: equipment shutdowns (A313) and efficiency losses. (A819) Any greater scope to the calculation of losses, particularly expanding the magnitude by a factor of over ten, would clearly go beyond any alleged understanding and would have required a definite agreement between the parties.

In contrast, PX 41 includes an extraordinary number of costs which could not reasonably have been anticipated by Luce on July 24 as being within the costs or efficiency losses described by Quinn. (A1600-A1601, PX 41, Appendices 2 and 3) Thus, for example, plaintiff has attempted to include in its costs such items as payments made by the AEC in lieu of taxes to communities in the vicinity of their facilities ("community support") (A1601), security investigations on AEC personnel (A1601), warehousing (A1601), research and development (A1601), recovery of scrap from the gaseous diffusion plants (A1600), transportation of uranium between plants (A1600), and the cost of distributing power among the plants. (A1600) The inclusion of such indirect costs, having nothing to do with efficiency losses, goes far beyond any interpretation which may be given to the conversation between Luce and Quinn on July 24, 1970 and must be excluded from consideration.

2. A POWER, RATHER THAN MONETARY, SURCHARGE WOULD HAVE RESULTED IN A SURCHARGE ONLY ONE-SIXTH AS COSTLY

It is a familiar principle of law that if a plaintiff can be made whole in two different ways that place unequal burdens on the defendant, the less onerous remedy should be chosen. *E.g., United States v. Northern Pacific R. Co.*, 116 F.Supp. 277 (D. Minn. 1953); *A.A. Baxter Corp. v. Colt Industries*, 88 Cal. Rptr. 842, 10 C.A.3d 144 (Ct. App. 1970). The plaintiff in this case has claimed over \$1.5 million as damages, more than 100% of the production cost of the 200 MW of power. It is clear, however, that another way of eliminating the alleged "losses" in 1970 was to obtain an "energy surcharge" rather than a monetary surcharge. As the AEC's own experience in January and October, 1970 shows,

such an energy surcharge would have been far less onerous. In such circumstances, Con Edison should at the most pay only the monetary worth of such a power premium.

The January 1970 power release of 350 MW was made at the request of TVA, which was experiencing a system emergency because of extremely cold weather. The release reduced the power level at the plants from 1900 MW to 1550 MW. (The 450 MW release in early July meant a reduction from 2000 MW to 1550 MW. [A2138-A2139, DX C-5]) By written agreement, TVA returned at a later time not only power equivalent to that released but also a power premium equal to about 10.4% of the power released. The purpose of the premium was to "compensate the AEC for production losses sustained as a result of this emergency reduction." (A1368, Pl. Ans. to First Set Interrog. 11).^{*} The method was designed to eliminate production losses by making the total SWU production what it would have been without the reduction, rather than merely, as in PX 41, by restoring the per unit cost of the fewer SWUs actually produced. The basic purpose—eliminating losses caused by a power reduction—is the same in both cases.^{**}

The same procedure was used in October 1970 when the TVA requested that 150 MW be released to it. (This began on October 1, 1970, when the 200 MW release to Con Edison was ending and in a real sense may be viewed as a continuing release of part of the 200 MW.) For that release, TVA again paid a power premium, this time of 14%. (Pl. Ans. to Second Set Interrog. 1, p. 4) Therefore,

^{*} Plaintiff claimed that in redoing calculations, it discovered that the power premium only made up for about half its production losses. That would only increase the premium to about 20%, still a long way from 100%.

^{**} The District Court believed that the evidence concerning the premium was scanty and that there was no reason to conclude the January reduction was comparable to the reduction at issue. (A73, Op 50, n.1) In view of the evidence indicated, it is respectfully submitted that the District Court was clearly erroneous.

the 200 MW release to Con Edison was flanked both before and after by similar power reductions for which TVA paid power premiums, costing percentagewise only a fraction of the claimed monetary premium here.

In the circumstances, it seems clear that a power premium would have represented a considerably cheaper method of making plaintiff whole, and there is no explanation why plaintiff did not calculate damages based upon obtaining additional power. From comparison with the January and October 1970 experiences, it is evident that such a premium, while somewhat uncertain, would have been somewhere in the area of 10% to 20% of the base power production cost.* Such an approach would have had the benefit not only of maintaining the unit production cost of SWUs, but also of maintaining the actual production of SWUs which the AEC presumably was interested in.

3. A "THRESHOLD METHOD" OF CALCULATING A SURCHARGE IS FAIRER THAN PX 41

If plaintiff is indeed entitled to any sort of damages, it is submitted that such damages should be evaluated in light of the emphasis which Con Edison, from the very first mention by Quinn of a surcharge, placed upon equal treatment with the recipients of the 450 MW release and in light of the AEC's failure even to ask these recipients for a surcharge at the time of that release. One manner in which the impact of the earlier release may be recognized is to limit damages only to the excess of the "costs" incurred by the 200 MW over the "costs" incurred by the 450 MW release.

Dr. Geller, again assuming PX 41 data, calculated damages based on such a "threshold approach". (A2465, DX Y-9) Dr. Geller calculated a surcharge for the 450 MW reduction in the same fashion that the plaintiff had calculated the similar figure in PX 41. The surcharge rate thus

* Interestingly, this corresponds with the initial impression received by Con Edison of what the recipients of the 450 MW release were paying as a surcharge.

calculated was 4.17 mills/KWH released for the 450 MW drop. (A1151) The comparable surcharge rate for the 200 MW reduction was 4.97 mills. Since the recipients of the 450 MW had not paid the 4.17 mills surcharge, Dr. Geller reasoned that Con Edison should similarly be excused from paying 4.17 mills of the 4.97 mills. Con Edison would thus pay only the excess, namely, $4.97 - 4.17 = 0.80$ mills per KWH, or a total of \$254,000.

The District Court was of the opinion that the threshold method should not be applied since "it was clear that the AEC was not offering gratuitous assistance in any respect." (A69, Op 46) That analysis misses the mark. Aside from the fact that the White House did in fact offer the assistance by July 23 without any mention of any reimbursement, it is clear that Con Edison insisted upon equal treatment from the initial mention of reimbursement of costs by Quinn on July 24. The "threshold" method gives at least partial recognition to that insistence—known to plaintiff from July 24.*

4. A PRICE PLANNING DATA APPROACH, GIVING EFFECT TO THE "TIME" FACTOR, MORE CLEARLY SHOWS THE ACTUAL ECONOMIC IMPACT OF THE 200 MW REDUCTION THAN DOES PX 41

As noted previously, one of the defects in the plaintiff's methodology is the assumption that whatever "loss" occurred to it resulting from the 200 MW release was actually experienced in 1970. In fact, the testimony is clear that the net effect of the 200 MW reduction in fiscal year 1971 was a benefit to the AEC of approximately \$1.4 million, the savings in cost of power. See page 26, *supra*. While there were fewer SWUs in inventory as a result of the 200 MW release, that fact did not cause any immediate actual loss to the AEC, and, indeed, as shown earlier (Point IX(D), *supra*), no loss had been actually incurred by plaintiff by the time of trial nor was there any showing that there

* Of course, as Con Edison has urged earlier, *supra*, full recognition of this insistence upon equal treatment should be given and should preclude the award of any damages.

ever would be a monetary loss in view of the increasing inventory of enriched uranium maintained by plaintiff. However, as an example of the impact of a delayed loss upon the damages claimed by plaintiff (*i.e.*, the consideration of *time* as a factor in evaluating economic impact), Dr. Geller at trial demonstrated that use of a ten-year period to calculate loss greatly reduced the claimed damages.

Dr. Geller modelled his analysis after the AEC's own methodology in determining the \$32.00/SWU charge for uranium enrichment which went into effect in late 1971. (A1163; A2425, DX V-9) The AEC methodology was described in a technical report delivered to the American Nuclear Society in 1971 by Roger LeGassie, of the Planning Division of the AEC. (A1163-A1167, A1169) This methodology involved setting forth the projections of costs (power, other operating costs, depreciation, added factor, and others) and of SWU production and sales during the ten-year planning period, Fiscal Years 1971-1980. (A2425, DX V-9) The AEC, after setting forth these projections, discounted to an end-of-fiscal-year-1970 "present worth" all of the projected cumulative costs and revenues for the entire ten-year period. The AEC similarly discounted to an end-of-fiscal-year-1970 "present worth" all of the projected SWU sales for the ten-year period and also discounted to "present worth" the projected number of SWUs remaining in pre-production inventory at the end of the ten-year period. The AEC then used all these discounted values to determine the "FY 71-80 Base Unit Cost":

$$\text{FY 71-80 Base Unit Cost} = \frac{\text{Discounted (Costs - Revenues)}}{\text{Discounted (Sales + Inventory)}} = \$27.74/\text{SWU}$$

The AEC then arrived at the actual charge of \$32.00/SWU by adding its 15% contingency factor (\$27.74 x 1.15 = \$31.90) and rounding up to the nearest whole dollar: \$32.00/SWU. (A1172-A1178)

In his calculations (A2463, DX W-9) Dr. Geller, using the same approach and the same projections, expressed

the change in the calculated price for SWUs which would result from a 200 MW reduction in power such as that which is the subject of the present suit. The projected costs, revenues, SWU sales, and end-period inventory remain the same except that, assuming the difference in power costs and the difference in SWU production calculated by plaintiff in PX 41, the fiscal year 1971 power costs decrease by about \$1.4 million and the end-period inventory decreases by about 125,000 SWUs. Using the same projections as in DX V-9, except for the above changes, Dr. Geller calculated the "present worths" of the costs, revenues, SWU sales, and end-period inventory and then, using the AEC's formula, calculated a FY 71-80 Base Unit Cost with the 200 MW reduction:

FY 71-80 Base Unit Cost (with MW drop) = $\$27.75323/\text{SWU}$
 Dr. Geller, continuing to proceed in the same fashion as had the AEC, next added the 15% contingency factor ($\$27.75 \times 1.15 = \31.91) and also rounded up to the nearest dollar for the SWU charge, i.e., $\$32.00/\text{SWU}$. (A1179-A1184)

Dr. Geller's analysis shows that the impact of a 200 MW reduction is so marginal (a 1 cent difference on base unit cost per SWU) that it was entirely covered simply by the AEC's "rounding off" of its charge to the nearest dollar and that the AEC's charge to its enrichment customers therefore did not change at all because of the 200 MW reduction. (A1184)

Dr. Geller next took the two Base Unit Costs, $\$27.75323/\text{SWU}$ and $\$27.4671/\text{SWU}$,* and calculated the difference, i.e., $\$0.00653/\text{SWU}$. This number represents the difference in Base Unit Cost (that is, before addition of the contingency factor and before "rounding up") occasioned by the 200 MW reduction. He then multiplied by the "present worth" number of SWUs to arrive at the total net economic

* Carried out to more decimals than in DX V-9 because the difference between the two Base Unit Costs is so small. (A1183)

impact of the 200 MW reduction, expressed in terms of 1970 net worth, *i.e.*, \$793,000. (A1184-A1185; A2463, DX W-9)

It should be emphasized that the calculations made by Dr. Geller were intended only as an example of the impact of time upon the proper evaluation of the economic consequences of a 200 MW reduction rather than an assertion that the \$793,000 in fact should be awarded as damages. For the purposes of emphasis in DX W-9, Dr. Geller included some categories of costs which even the plaintiff admitted should not be included in damages, *e.g.*, interest on plant and equipment. (A1234) Even with inclusion of such extraneous costs, the resulting number, \$793,000, was only about half of the plaintiff's claimed figure in PX 41. The District Court rejected the analysis of DX W-9 because "it is based upon 1971 estimates which have not survived the test of time." (A69, Op 46) While admittedly the analysis in DX W-9 was based upon projected costs which formed the basis of the AEC's calculation of its SWU charge and while admittedly these projections were not necessarily always borne out in experience, it is submitted that the basic approach of DX W-9 is nonetheless valid and shows the impact of time upon calculation of damages, and it is further urged that the inclusion of extraneous costs, such as interest, at least balances out any increases in costs shown in hindsight. Further, questioning the validity of the analysis in fact questions the validity of the approach used by the AEC in calculating its charges to its enrichment customers, since the same analysis was used for those calculations.

5. AN "AVERAGE" SURCHARGE APPROACH MORE FAIRLY GAUGES THE ECONOMIC IMPACT OF THE 200 MW REDUCTION

At trial, plaintiff's witnesses who prepared PX 41 testified that the calculations contained therein were based on the same methodology used by ERDA every six months in calculating a surcharge to be imposed in connection with any possible power release. In fact, however, there is a major difference between the two. The prospective surcharge now prepared by ERDA is a single figure which

does not depend upon whether a given power release is the first, second or third of several which are concurrently in effect; all parties taking a power release simultaneously pay the same charge regardless of whose request came first. In effect, every recipient of the released power pays an "average" surcharge. That is not the case as to PX 41, which contains a surcharge on the 200 MW viewed as the last released power with the highest efficiency losses. Thus, the PX 41 surcharge is much higher than a surcharge calculated on an "average basis" which includes both the 450 MW released in early July 1970 and the concurrent 200 MW released for New York City later in July.

Defendant's expert, Dr. Geller, prepared a calculation for an average surcharge, that is, a single surcharge rate applied to the total of all the power being released during the period of July 27 through October 1, 1970, and then figured Con Edison's proportionate share. Dr. Geller's calculation was \$1,319,257 (A2464, DX X-9) compared with the figure of \$1,576,795 calculated by plaintiff on a non-averaged basis. This figure assumed the data set forth in PX 41 and thus includes all the indirect costs, such as payments in lieu of taxes, which Con Edison contends should not be included in any damages in this case (*See Point IX(F)1, supra*).

Earlier, the Government had in fact made similar calculations for an average surcharge, with results of \$1,305,960. (A629; A2221-A2222 DX D-6) This calculation was one of several prepared by W. H. Henderson, then Director of Finance of the AEC in February 1972. Commenting on the validity of this method ("Case I"), compared with certain other methods (including one essentially that of PX 41), Mr. Henderson stated:

"We recommend that this [average] method be used since it follows more closely established Commission policy for determining surcharges. We also feel that it is more equitable since all reductions are priced at the same unit cost. Power was being taken by firms other than Con Ed at the same time, and we

see no reason for applying a different unit cost.”
(A2221)

In the same document (A2222, DX D-6), Mr. Henderson also made a calculation (Case III) using essentially the methodology used in PX 41 (A630, A1590-A1602), but rejected it, stating that “it is not a valid method” (A2222)

The District Court, however, rejected this approach on the ground that Quinn had made it clear to Luce in the July 24 conversation that the drop to the lower megawatt level would be more expensive. (A69, Op 46) As previously discussed, Luce at that time emphasized that Con Edison be treated on a basis equal with the recipients of the 450 MW, so that the Court’s reasoning is in error. If, despite Luce’s reservation, Con Edison must pay what the others did not, surely in equity that sum should be limited to what each would pay if all paid on an average basis.

CONCLUSION

For all the above reasons, the judgment of the District Court so far as appealed from by Con Edison should be reversed and the remaining causes of action of the complaint dismissed.

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